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11/11/1781

DECISIONS

OF THE

COURT OF SESSION.

From JANUARY 1778 to DECEMBER 1781.

COLLECTED

By Appointment of the FACULTY of ADVOCATES.

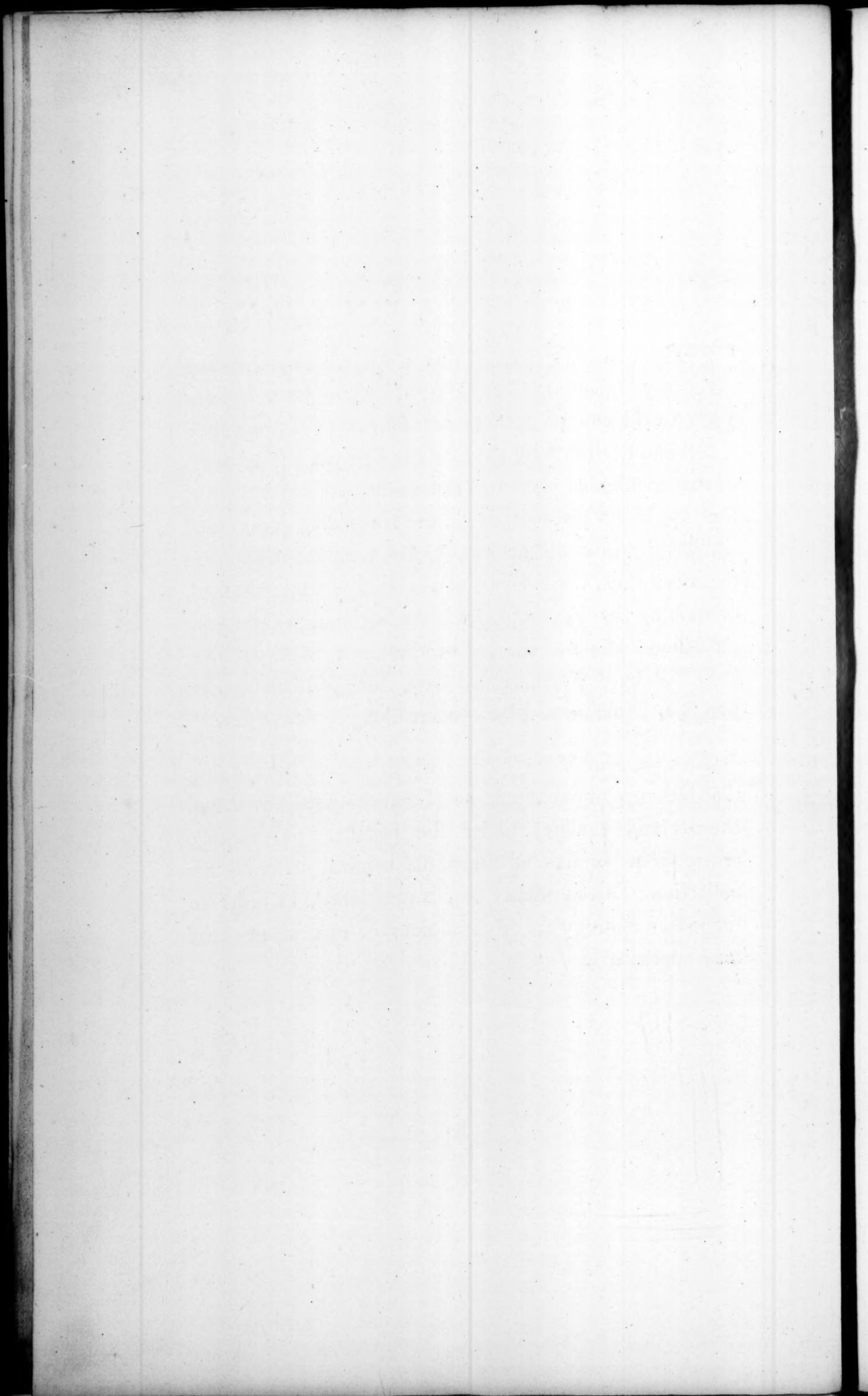
EDINBURGH:
PRINTED FOR
BELL & BRADFUTE, & E. BALFOUR.
M,DCC,XCI.



A D V E R T I S E M E N T.

THE preceding part of this volume, comprehending the Decisions of the Court of Session from January 1778 to the end of the summer-session 1779, was collected and published by the late Mr Ogilvie. The death of that gentleman prevented the immediate appearance of the Decisions pronounced in the succeeding year, and which till now could not be prepared for publication. In the mean time, the last part of the volume was published, containing the Decisions, from the beginning of the winter-session 1780-1 to the end of the summer-session 1781, collected by Mr Alexander Law, Mr William Steuart, Mr John Dickson, and Mr Robert Craigie, Advocates.

THE portion of the volume which follows here, being that hitherto unpublished, has been compiled (by Mess. Steuart and Craigie) under the peculiar disadvantage arising from the loss of the whole original materials for collection; a circumstance that is mentioned, in order to suggest an apology for any omissions or inaccuracies that may appear in it.



DECISIONS

OF THE

COURT OF SESSION.

No. I.

January 13. 1778.

JAMES DAVIDSON,

Against

MARION ELCHERSON.

Succession ab intestato in moveables situated in a foreign country. Situs of bank-notes.

WILLIAM MURRAY having, in the course of business, left Scotland in 1768, and gone to Hamburgh, died there soon after, without making any settlement. Parish, a Hamburgh merchant, took the custody of his chest, in which effects were found to the value of L. 300, consisting in part of bank-notes.

Marion Elcherion, his mother, claimed the succession to these effects in the court at Hamburgh, as heir by the law of that country.

The uncles and aunts of Murray confirmed *qua* nearest of kin to him before the Commissaries of Edinburgh, and transferred to James Davidson their right to Murray's effects at Hamburgh.

Parish brought a multiple-poining, in which appearance was made for both these parties. Davidson insisted for decret against Parish to deliver over these effects to him, the succession in which ought to be regulated by the laws of Scotland. Elcherion contended, that the law of Hamburgh, where the effects were situated, must be the rule.

Pleaded for Davidson : 1^{mo}, Murray was not at Hamburgh, *animo remanendi*. Consequently his domicile continued to be in Scotland, his native country. The law of the defunct's domicile regulates the succession, *ab intestato*, in his moveables, wherever situated. This is founded on principles of equity. The defunct is presumed to have known the

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the heir pointed out by the law of his own country ; and, by not making a settlement, shows his intention to have that heir to succeed to him. The slight circumstance of his having moveable effects in a foreign country, does not imply that he was even acquainted with the laws of succession there, much less that he meant his succession in these moveables to be governed by them.

It is otherwise in the case of a land-estate, which has a fixed and permanent situs. But moveables have no fixed situs. Their place may be shifted without the consent, or even the knowledge of the person in the right to them, as in the case of debts due by bond, or other *nomina debitorum*, the situs of which alters with every change of residence in the debtor. The real situation of moveables, therefore, cannot afford any rule, in justice or equity, for regulating the succession to them. By a fiction of law, their situs is held to be in the place where the defunct had his domicile ; and, by the law of that domicile, the succession to them is accordingly governed. Voet. L. 1. t. 4. § *Quamvis*, &c. Prin. of Equity, b. 3. c. 8. § 3. Ersk. Inst. b. 3. t. 9. § 4. Brown of Braid *contra* John Brown, 28th November 1744, Kilkerran ; a decision in point.

The interposition of the court at Hamburgh may be found necessary to carry the judgment in favour of the heirs, by the law of Scotland, into execution. But, it is to be presumed, that the foreign court will give effect to that judgment, as, in distributing these moveables, the rules of succession, in this country, ought, in equity, to be adopted by the court at Hamburgh. At any rate, the assignee of the heirs is entitled to have the decret of this court, ascertaining his right to these effects.

2do, Whatever may be the case as to other effects, the situs of the bank-notes found in Murray's chest at Hamburgh, was in this country. The situs of these, like that of bonds, bills, and other *nomina debitorum*, is where the debtor resides. This holds, at least, as to such of them as are notes of private banks, to which the privilege of being held as cash ought not to be extended.

Pleaded for Elcherfon : imo, The subject in question being locally situated at Hamburgh, and Parish, the raiser of the multiple-pointhing, residing there, nothing can be decided *cum effectu* in this court. The action, therefore, should be dismissed, leaving the parties to prosecute their claim in the proper court at Hamburgh.

If a judgment is to be given, it ought to be found that the succession must be regulated by the laws of Hamburgh. The local situation of effects determines the law by which they must be governed in all cases ; because it is there only that jurisdiction can be exercised over them, wherever the domicile of the proprietor may be.

This is the received doctrine of the law of Scotland, and applies equally to moveables which have a situs at the time, as to immovables, whose situs is fixed. In the Dictionary of Decisions, *voce* Foreign, many instances are mentioned illustrating this principle, That the moveables of foreigners locally situated within Scotland, are regulated by its municipal law, in every particular, and in that of succession, as much as any other. In the case of Henderfon, 9th December

1623, Durie, it is mentioned as a part of the judgment, ' That goods ought to be asked by that person who would be found to have right thereto, by the law of the kingdom within which they are, and not the law of any other kingdom.' And, in another case, Melvil, 3d July 1634, Durie, this is likewise said to have been given as the opinion of the court. Lewis *contra* Schaw, 19th January 1665, Gilm. Biffet, 19th July 1666, Dirleton. Stair, b. 1. t. 1. § 10. Bankton, b. 1. t. 1. § 82. and 83. Dirlet. *voce* Nom. Deb.

The contrary doctrine is not founded on solid grounds. Any supposed predilection in the deceased, for the law of the domicile cannot be regarded in this question. Succession *ab intestato*, is the act of the law, and looks not to the will of the deceased, presumed or implied. It takes place when he has no will, as in the case of an infant, or an idiot. The law, therefore, must have its operation on effects subject to its authority, independent of any conjecture, from the residence of the deceased in another country, that he would have inclined the law of that country to take place. The decision in the case of Brown of Braid is single, and contrary to all the former decisions.

2do, That part of the effects, consisting of bank-notes, is in no different situation from the other effects; for such notes are, in law, held to be cash. So it was expressly decided, 24th February 1749, Hugh Crawford *contra* the Royal Bank. Consequently, the situs of the bank-notes, like that of coin, is where the notes themselves are found to be.

Whether these notes are of a public or private banking-company, does not alter the case. It is from the terms of the notes, and not the authority of the persons who issue them, that they are held as cash.

The court found, ' That the distribution of the moveables in this case must be regulated by the laws of Hamburgh, where these moveables are, and were situated at the death of William Murray: That no action for such distribution lies, or is competent before this court; therefore dismisses the foresaid process of multiple-poining, and competition relative thereto.'

A reclaiming petition against this interlocutor was ordered to be seen, in so far as respected the situs of the bank-notes. On advising the petition with answers, the court adhered.

For Davidson, *M^r Laurin, Armstrong.* Alt. *J. Campbell, Cullen.*

No. II.

January 13. 1778.

HELEN HENDERSON,

Against

JOHN M'LEAN, and others.

Succession to effects recovered in a foreign country, under a will executed there.

JOHN M'LEAN, a captain of artillery in the East India Company's service, having been mortally wounded in an engagement at Tingarecotta, in the Mogul's country, immediately before his death, executed a will, by which he bequeathed his whole estate to his father, a brother and sister, in certain proportions. The will was proved, in common form, in the Mayor's court of Madras. The executors recovered the funds, which were all in India, and remitted them to the legatees in Scotland. Afterwards, Helen Henderson, M'Lean's widow, brought an action against the legatees, claiming a third part of the defunct's moveables, as her *jus relictæ*.

The same point was argued in this cause that was argued in the former, Whether the law of the defunct's domicile, or of the place where the effects were situated, regulates the succession in these effects?

A separate plea maintained for the pursuer was, that supposing the *lex loci* regulates the succession of moveables, no *lex loci* is here ascertained to exclude the law of Scotland. It was said, That the law of England does not extend to the Company's territory on the Corromandel coast; but, although the English law reached the territory of Madras, Tingarecotta, where M'Lean died, being in the Mogul's country, the succession to such personal effects as he had with him there, would be regulated by the law of that country, if it were known. As it is not, and the effects are now in the hands of the legatees residing in Scotland, the court has jurisdiction over them; and the widow's claim to her *jus relictæ*, by the law of Scotland, ought to be sustained.

Answered for the legatees: The effects were recovered, and the legatees are in possession by authority of the law of the place where the effects were situated at the time of the defunct's death; and therefore no claim of succession to them, on the law of this country, can be sustained against the legatees. Had they been brought here, without authority, it is not the law of Scotland, but of the country where they were at the time of the defunct's death, that would regulate the succession to them.

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The British residing in the East Indies, whether in a civil or military capacity, are under the law of England ; and every question as to their persons or effects, must be governed by that law, as received in the English courts there.

Captain M'Lean died upon an expedition into an enemy's country. The law of it could not regulate his succession while in the British camp.

The court found, ' That the pursuer has no claim to a *jus relictae*, ' out of the estate and effects of said Captain M'Lean, conveyed ' by the said will.'

For the Pursuer, *M'Conochie, Blair. Alt. Crobie, Solicitor General, Rae.*

No. III.

January 15. 1778.

J O S E P H K N I G H T, a Negro,

Against

J O H N W E D D E R B U R N.

State of a Negro brought into this country from the Plantations.

THE commander of a vessel in the African trade, having imported a cargo of Negroes into Jamaica, sold Joseph Knight, one of them, as a slave, to Mr Wedderburn. Knight was then a boy, seemingly about twelve or thirteen years of age.

Some time after, Mr Wedderburn came over to Scotland, and brought this Negro along with him, as a personal servant.

The negro continued to serve him for several years, without murmuring, and married in the country. But afterwards, prompted to assert his freedom, he took the resolution of leaving Mr Wedderburn's service, who, being informed of it, got him apprehended, on a warrant of the justices of the peace. Knight, on his examination, acknowledged his purpose. The justices found ' the petitioner entitled to ' Knight's services, and that he must continue as before.'

Knight then applied to the sheriff of the county, (Perthshire), by petition, setting forth, ' That Mr Wedderburn insisted on his continuing a personal servant with him,' and prayed the sheriff to find, ' That he cannot be continued in a state of slavery, or compelled to ' perpetual service, and to discharge Mr Wedderburn from sending ' the petitioner abroad.'

After some procedure in this process, the sheriff found, ' That the ' state of slavery is not recognised by the laws of this kingdom, and is ' inconsistent with the principles thereof: That the regulations in ' Jamaica, concerning slaves, do not extend to this kingdom ; and repelled the defender's claim to a perpetual service.' Mr Wedderburn having reclaimed, the sheriff found, ' That perpetual service, without ' wages, is slavery ; and therefore, adhered.'

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The defender removed the cause into the court by advocacy. The Lord Ordinary took it to report, upon information; being a question of general importance, the court ordered a hearing in presence, and afterwards informations of new, upon which it was advised.

Pleaded for the Master : That he had a right either to the perpetual service of the Negro in this country, or to send him back to the plantations from which he was brought. His claim over the Negro, to this extent, was argued on the following grounds :

The productions of the colonies, ever since they were settled, have been cultivated by the means of Negro slaves imported from the coast of Africa. The supplying the colonies with these slaves has become an extensive trade, without which, the valuable objects of commerce, now furnished by the plantations, could not be cultivated. British statutes have given sanction to this trade, and recognised the property of the master in such slaves; 10th W. III. c. 26. 5th George II. c. 7. 23d George II. c. 3.

The property, which, in Jamaica, was established in the master over the Negro, under these statutes, and the municipal law there, cannot be lost by a mere change of place. On principles of equity, rights acquired under the laws of foreign countries, are supported and enforced by the courts of law here. A right of property will be sustained in every country where the subject of it may come. The *status* of persons attend them wherever they go; *Huber, lib. 1. T. 3. c. 12.*

The law of the colonies is not to be considered as unjust, in authorising this condition of slavery. The statutes which encourage the African trade show, that the legislature does not look on it in that light. The state of slavery is not contrary to the law of nations. Writers upon that law have enumerated several just and lawful origins of slavery; such as contract, conquest in a just war, and punishment of crimes. In cases where slavery is authorised by the law of Jamaica, it must be presumed to have proceeded on a lawful origin. The municipal law of no country will be presumed unjust.

A state of slavery has been universally received in the practice of nations. It took place in all the ancient nations, and in all the modern European nations, for many ages. In some of them it still remains; and in none of them has it been abolished by positive enactments, declaring it unjust and illegal, but gone into disuse by degrees, in consequence of many different causes. Though, therefore, the municipal law of this country does not now admit of this state of slavery in the persons of citizens; yet, where foreigners, in that state, are brought into the country, the right of their masters over them ought not to be annihilated.

In this case, the master is not insisting for the exercise of any rigorous powers. He only demands, that he shall be entitled to the personal service of the Negro, in this country, during life. His right to this extent, at least, is not immoral or unjust; nor is it even reprobated by the municipal law of this country. A person may bind himself to a service for life; *Ersk. Inst. p. 147.*

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But, in the *last* place, if this is denied, the master must, at least, be permitted to compel the Negro to return to the plantations from whence he was brought, otherwise he is entirely forfeited of his right.

Some cases from the English law-books were adduced to show, that, in England, the master's right of property in his Negro, remains after he is brought into that country; Butts *contra* Penny, 1677; Kebble's Rep. p. 3. p. 785. Gilly *contra* Cleves; 5th William and Mary, Lord Kaymond, Rep. v. 1. p. 147. and the opinion of two very eminent lawyers in the 1729, Sir Philip York then Attorney General, and Mr Talbot Solicitor General, in these words: ' We are of opinion, that a
' slave, by coming from the West Indies, either with or without his
' master, to Great Britain, or Ireland, doth not become free; and that
' his master's *property* or *right* in him is not thereby determined or
' varied; and baptism doth not bestow freedom on him, nor make any
' alteration in his temporal condition in these kingdoms. We are also
' of opinion, that the master may legally compel him to return to the
' plantations.'

Answered for the Negro: The only title on which any right of dominion is claimed over this African, is the institution of the municipal law of Jamaica, which authorises the slavery of Africans brought into that island. Under that law, this Negro, a child when brought into Jamaica, while he remained there, was subjected to the unjust dominion which it gives over these foreigners; but the municipal law of the colonies has no authority in this country. On grounds of equity, the court, in some cases, gives effect to the laws of other countries; but the law of Jamaica, in this instance, will not be supported by the court; because it is repugnant to the first principles of morality and justice.

Subordination, to a certain extent, is necessary. But there are certain bounds beyond which, if any institution subjecting one individual to another should go, the injustice and immorality of it cannot admit of a doubt. Such is the institution of slavery, depriving men of the most essential rights that attend their existence, and which are of a nature that admit not of any equivalent to be given for them. The most express consent given in a voluntary contract cannot authorise the assuming of these rights, or bind the consenting party to submit to the condition of a slave. A stipulation of that kind affords intrinsic evidence of an undue advantage taken, and is therefore sufficient to void the contract.

But, although it were justifiable to admit of a slavery proceeding on a title of contract, of conquest, or of punishment, the law of Jamaica would not be the less unjust. In subjecting the Africans to slavery, that law requires no title under any of these grounds. The circumstance, that the Negroes are brought into Jamaica, is all that is requisite to fix on them indiscriminately the condition of slavery. It is, therefore, a slavery established on force and usurpation alone, which no writer on the law of nations has vindicated as a justifiable origin of slavery.

If the law of Jamaica had made any distinction, or required any title to the slavery of an African, this Negro would never have been reduced by it to that state. Being a child when he was brought into
Jamaica,

Jamaica, he could enter into no contract, commit no crime, and conquest cannot give a right to kill or enslave children.

The means by which those who carried this child from his own country got him into their hands, cannot be known; because the law of Jamaica makes no inquiry into that circumstance. But, whether he was ensnared, or bought from his parents, the iniquity is the same. —That a state of slavery has been admitted of in many nations, does not render it less unjust. Child-murder, and other crimes of a deep dye, have been authorised by the laws of different states. Tyranny, and all sorts of oppression, might be vindicated on the same grounds. —Neither can the advantages procured to this country by the slavery of the Negroes, be hearkened to as any argument in this question, as to the justice of it. Oppression and iniquity are not palliated by the gain and advantage acquired to the authors of them. But the expediency of the institution, even for the subjects of Great Britain, is much doubted of by those who are best acquainted with the state of the colonies; and some enlightened men of modern times have thought that sugar and tobacco might be cultivated without the slavery of Negroes.

The dominion, therefore, given by the law of Jamaica over the pursuer, a foreigner there, being unjust, can receive no aid from the laws of this country. The modification proposed of this claim of slavery makes no difference on the merits of the question. It is plain, that, to give the defender any right over the pursuer, the positive law of Jamaica must always be resorted to; consequently, the question recurs, Whether that law ought to be enforced beyond its territory? But a service for life, without wages, is, in fact, slavery. The law of Scotland would not support a voluntary contract in these terms; and, even where wages are stipulated, such a contract has been voided by the court; Allan and Mearns *contra* Skene and Burnet, December 1728; Dictionary of Decisions, *Pact. illicitum*.

The same answer was given to the other claim, of sending the Negro out of this country, without his consent, that it supposes the dominion given over the pursuer by the law of Jamaica to be just. The Negro is likewise protected against this by the statute 1701, c. 6. which expressly prohibits the carrying any persons out of the kingdom without their consent. The words are general, and apply to all persons within the realm.

In support of this argument for the Negro, authorities of French writers were adduced, to show, that formerly, by the laws of France, Negroes brought into that country from the plantations became free. This was their law until lately, that, by special edicts, some alterations were made upon it; *Denifart, tom. 3. v. Negroe*. On the law of England, several cases were mentioned, in which different judges had expressed opinions, that a Negro coming into England is free there; 1. Salh. 666. Smith *contra* Brown and Cooper; Shanley *contra* Nalvey, in Chancery 1762; Hargraves arg. p. 58.

But the late case of Sommerfet the Negro, decided in the King's Bench in the 1772, was chiefly relied on, and said to be in point, at least upon this question, Whether the Negro could be sent out of England?

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The court were of opinion, that the dominion assumed over this Negro, under the law of Jamaica, being unjust, could not be supported in this country to any extent: That, therefore, the defender had no right to the Negro's service for any space of time, nor to send him out of the country against his consent: That the Negro was likewise protected under the act 1701, c. 6. from being sent out of the country against his consent.—The judgments of the sheriff were approved of, and the Court 'remitted the cause *simpliciter*.'

For the pursuer, *Fergusson, Cullen*. Alt. Advocate, *M^r Laurin, M^r Conochie*, Clerk, *Tait*.

No. IV.

January 17. 1778.

E A R L of S E L K I R K,

Against

R O B E R T N A S M I T H.

A reference of the price, in a contract of sale, to arbiters, found to be binding on the heirs of the referrer.

ROBERT NASMITH, proprietor of the lands of Glenlee, agreed to dispose of these lands to the Earl of Selkirk.

The terms of the bargain were evinced by the missives of both parties. It was established, that they had agreed to refer the price to two arbiters, one to be chosen by each: That payments had been made by Lord Selkirk, to accompt, of the price: That, afterwards, the arbiters had been named and accepted. But, before the arbiters had fixed on the price, Nasmith died.

Lord Selkirk brought a declarator against Robert Nasmith, heir apparent to the defunct, for having it found that this was a concluded bargain. Robert Nasmith renounced to be heir. But James Nasmith having adjudged the lands, as creditor to the defunct, appeared as a party in the declarator; and insisted, that there was no concluded sale of the subject to Lord Selkirk; and, therefore, that it was carried by his decret of adjudication.—In the course of the process, a price for the subject was fixed on by the arbiters, in consequence of a remit from the court.—On the merits,

Pleaded for the adjudger: It is essential to the contract of sale that the price be fixed; without which, the contract, though parties are agreed in other respects, is not concluded; § 1. *Inst. de Emp. Vend.* Bankton, v. 1. p. 439. § 3. In the bargain betwixt Lord Selkirk and Nasmith for the sale of these lands, the price was not fixed by the parties: It was only referred to arbiters.—Nasmith having died before the arbiters had fixed

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the price, the arbiters had no power to name any price thereafter, as submissions fall by the death of any of the referrers, unless heirs are specially mentioned; l. 27. § 1. and l. 49. § 2. *de Rec. Arb.*; Bankton, v. 1. p. 455; Erskine, p. 697.—There was, therefore, no concluded sale.

Answered: While the price is only matter of communing betwixt the parties, the contract of sale is not concluded. But, when the parties are fixed by mutual agreement, it makes no difference whether they agree to specify a particular sum as the price, or name certain persons to specify the sum. After fixing on such persons, the parties can no more go back on the price, than if they had fixed on the price itself.—Accordingly, in law, that price is said to be certain which is referred to certain persons; § 1. *Inst. de Emp. Vend. l. ult. c. de Contract. Emp.*

It is of no consequence, therefore, that the price was not named, in this case, by the arbiters, till after the death of one of the parties.—The contract of sale was concluded by the nomination of these arbiters.

The authorities brought to shew, that submissions are not binding on the heirs of the submitters, apply only to submissions, as separate deeds, unconnected with any other contract or transaction implying an obligation on heirs. But a reference, such as the present, is part of the contract of sale, and must go along with it. From the moment that contract is concluded, it is binding on the heirs of the contractors; and the parties having in view a transaction that is to affect their heirs, cannot be supposed to intend that these heirs should not be equally obliged to submit to this reference of the price, as to every other part of the contract.

The court were of opinion, that the reference was binding on the heir, and that he was obliged to admit the price fixed on by the arbiters after the death of the referrer; therefore, found ‘that there was sufficient evidence of a completed bargain.’

A&A. *Crosbie.*

Alt. *Craig.*

No. V.

January 18. 1778.

R O B E R T M O N T G O M E R Y, and others,

Against

J O H N P A R K E R.

Import of the act 12mo George III. c. 72. as to the time of lodging claims by creditors.

THE personal estate of William Wilson, a bankrupt, was sequestrated upon the statute 12mo Geo. III. c. 72. After the effects had been converted into money, a scheme of division lodged in the process, and

and the Lord Ordinary had allowed all concerned to see, and give in objections, but before his Lordship had reported the scheme, an interest was given in for Montgomery and Wilson, creditors who had not formerly appeared. These creditors insisted that they were entitled to draw their proportional share of the first dividend, in consequence of the interest then produced.

An objection was suggested to this claim by the factor, upon the 6th and 10th clauses of the statute, bearing, in substance, That such creditors as shall not produce their claims, with the vouchers thereof, and make oath on the verity of their debts, ' within nine callender months ' after the date of the sequestration, ' shall not be entitled to any share in the first distribution of the debtor's estate among the creditors.

The nine callender months were expired before the claim or vouchers were lodged.

Answered for the Creditors : That another rule is adopted in § 11th of the statute, by which it is enacted, ' That such creditors only, who ' shall have produced their vouchers, and grounds of debt, and proved ' the verity thereof, before the day fixed for each distribution, as before ' mentioned, shall be entitled to a share in such distribution.' By this, it seems to be meant, that it is sufficient if the debts are proved, and vouchers produced, before the day fixed for the distribution.

The court found, ' In respect that the claims of Montgomery, Wilson, and Smith, with the vouchers thereof, were not lodged with the ' clerk to the sequestration before the expiry of nine callender months ' from the date of the sequestration, that, therefore, they were not entitled ' to draw any share of the bankrupt's effects in the first distribution.'

For the factor, *Ad. Ogilvie.* *Alt. Rolland.*

No. VI.

January 22. 1778.

T H O M A S T A I T,

Against

G E O R G E S K E N E K E I T H.

Right of the patron to present by a commissioner.

GEORGE SKENE KEITH, late Earl Marishal, having his residence in a foreign country, committed the management of his affairs in Scotland to Messrs Alexander Keith elder and younger; and the commission under which they acted contained a special power to grant presentations to the churches whereof he was patron.

In 1776, the church of Keith-hall, in the gift of Lord Marischall, became vacant. Two presentations were granted: One on the 9th May,

May, in favour of Skene Keith, by Lord Marischall's commissioners, who had previously received a letter from him, desiring them to present Keith. This presentation was transmitted next day by post to the presentee. The other was executed on the 10th May by Lord Marischall himself at Potsdam, in favour of Thomas Tait, and was on the same day transmitted by post to his commissioners, but without instructions to forward the presentation to Tait. The commissioners having already presented Keith, sent it back to the patron at Potsdam, from which it was afterwards transmitted to the presentee.

After some procedure in the church-courts, mutual declarators were brought at the instance of Keith and Tait, for ascertaining the preference of their respective presentations.

Pleaded for Tait: 1mo, The power of presenting cannot be delegated to a factor. It is a faculty personal to the patron. In no statute or law-book is mention made of presenting by a commissioner or factor.

The act 10. An. c. 8. obliging the patron to qualify, proceeds on this principle, that the right of presenting cannot be delegated. By that statute, § 6. and 7. the patron is strictly required to take the oaths to government; and, if suspected of popery, to subscribe the formula, before presenting, otherwise the presentation is declared to be null.

If it had been lawful to present by a factor, the act of parliament, in order to prevent these regulations from being defeated altogether, would have required the same oaths to be taken by the factor presenting, as by the patron when he presents. But, as it was understood to be the law, that the factor could not present, this was unnecessary. Accordingly, in practice, no popish patron attempts to present by a factor; and it is always thought necessary that the patron, who does not chuse to take the oaths required by the statute, should dispoise the right of patronage itself, *pro hac vice*, to one who will comply with the law in this respect. Because the power of presenting cannot be delegated, crown-presentations must proceed on a sign-manual, tho' the crown acts by its commissioners, the barons, in disposing of vacant stipends, and exercising every other right consequent on patronage.

2do, Supposing it lawful to present by commissioners having special powers, commissions of that kind are, from their nature, revocable, either expressly or tacitly. Lord Marischall, by presenting himself, virtually revoked, in that instance, the general commission to the Messrs Keiths; and the presentation by him, as it was granted before any thing had followed on that by the commissioners, must be preferred, as the true choice and nomination of the patron. The presentation by the commissioners is not to be considered as even prior to the other: For, though it is earlier in date, both must be held as delivered at the same time, both being put into the post-office on the same day.

Pleaded for Skene Keith: 1mo, The right of patronage is a patrimonial right *in commercio*, and the power of presenting is a branch of it. It is not disputed that the patron can exercise all the other branches and pertinents of this right by a factor, such as uplifting and discharging the

the vacant stipends, tithes, &c.—There is no solid reason given for making an exception of the power of presenting.

There was no need to notice the case of a factor presenting in the statute 10mo, an. c. 12.—As the patron from whom the right flows must be qualified, it is immaterial whether the commissioner is so or not. In the present instance, both patron and commissioners were qualified.—Law-books may not have laid down, *totidem verbis*, that a patron can present by a factor specially empowered. But, in cases where doubts might possibly arise, the law-books are not silent. It is said the tutor may present, in name of the pupil, the husband as administrator for the wife, &c. Bank. v. 2. p. 37. § 100.—Crown-presentations require a sign manual; because it was not judged expedient for the crown to delegate the power of presenting to the Barons, whose offices are for life, and not from any doubt that the power of presenting might be delegated.

The usage was said to be in favour of this plea, and that it was a common practice among patrons residing abroad, to present by commissioners, having special powers.

2do, The presentation by the commissioners is the prior presentation. It is confessedly so in date. As to the delivery, the two presentations were put into different post-offices on the same day: But that of the patron was then transmitted by him only to his commissioners, and not to the presentee. It must, therefore, be held as remaining in the custody of the patron, until, upon being sent back, it was afterwards transmitted from Potsdam to the presentee. But the presentation by the commissioners was in the hands of their presentee before that time; consequently it is prior in point of delivery. In every question with a posterior presentation by the patron, it must be considered as the presentation of the patron himself. It is, therefore, of no moment, that Skene Keith was not *de facto* settled by the church before the presentation to Tait. The patron was *functus*, as well as the commissioners, by the first, and no effectual presentation could thereafter be granted to either.

In this case each party alledged, that undue means had been used in obtaining the other's presentation; and, in the action at the instance of Tait, this was made a ground of reduction. But the cause was determined by the court solely on the ground of law.

The court were unanimously of opinion, that a patron may delegate his power of presenting to a factor. They found, 'That the Messrs Keiths, having full and special power by commission from G. Keith, late Earl Marishall, to grant presentations to parish-churches, whereof he is patron, in the same manner he could do himself; and having granted a presentation, as commissioner afore-said, to Mr Skene Keith, to be minister of this parish, which was prior to a presentation to the same parish, granted by the Earl himself to the said Thomas Tait: Therefore, in a competition betwixt the two presentees, found the presentation to Keith preferable.'

For Keith, D. Rat. G. Ogilvie. Alt. Advocate, Croftie.

No. VII.

January 28. 1778.

DAME ROBINA POLLOCK, Spouse to *Sir HUGH CRAWFORD*, and *Sir HUGH* for his Interest,

Against

MARY PORTERFIELD, Widow of *JOHN LOCKHART* of *Lee*.

Powers of a Trustee. Negative prescription.

WINIFRED and Dorothy Luckens, were seised, to them and their heirs, in certain lands in the county of Essex. Dorothy was married to James Lockhart, a younger brother of Mr Lockhart of Lee; and, by a postnuptial settlement, her moiety of these lands stood limited to the use of James Lockhart, during his life, without impeachment of waste; after his death, to Dorothy his wife, in name of jointure; after her decease, to the sons of the marriage, in the order of their birth, and the heirs-male of their bodies; and, for default of such issue, to the daughters of the marriage, and the heirs of their bodies; and, for default of such issue, to the said James and Dorothy, and the heirs of the survivor of them, for ever.

A partition was afterwards made of the lands betwixt the two sisters. Dorothy and her husband, having in view to dispose of their part of the lands, revoked and made void the uses of the former deed, with consent of the parties to it. This they were empowered to do, by a clause in the deed itself. A new deed was then executed by the husband and wife, vesting the lands in trustees, with power to sell the premises, and apply the price, in the first place, to extinction of debts to a certain amount, chargeable on them; the remainder to be 'disposed of in the purchase of other lands, tenements, or hereditaments, 'within the kingdoms of England or Scotland.' And it is provided, that the lands so to be purchased, are to be settled, and the rents and issues of the subject, until such purchase is made, are to be disposed of to the same uses and purposes as were limited and declared by the former deed.

In order the more effectually to carry this sale into execution, an act of parliament was obtained, (4th Queen Anne), which likewise directs the trustees to lay out the residue of the price on the purchase of some other 'lands, tenements, and hereditaments,' to be settled to the same uses, and on the same *series* of heirs specified in the former deeds. But the act of parliament, in requiring the lands to be settled, in the first place, to the life-estate of James Lockhart, does not add, *without impeachment of waste*, as in the former deed. The lands were sold by the trustees, and the residue of the price soon after vested in South Sea stock, in name of Sir John Stanley, survivor of the trustees.

James Lockhart succeeded to the entailed estate of Lee, encumbered with debts contracted by the entailer. He survived his wife Dorothy,

rothy, and died in the 1715, leaving issue by her one son John, and two daughters.

In 1721, a bill was filed in Chancery, at the suit of the infant John Lockhart, by the Countess of Forfar, his next friend, in which it was, *inter alia*, proposed, that the trust-fund should be applied to pay off the debts on the estate of Lee. By decree of the master of the rolls, it was referred to a master in Chancery, to inquire into the propriety of this measure, and to carry it into execution, if beneficial for the infant; but, in that case, it was ordered, that the assignments from the creditors of their securities to the trustee should be taken upon the trust, and to the uses limited by the acts of parliament. It was likewise referred to the master in Chancery, to appoint a new trustee in place of Sir John Stanley, who desired to be discharged of the trust.

The master reported, that he had approved of the Countess of Forfar as trustee, and had appointed Sir John to assign his trust, and to pay over the monies to her, 'subject to the said trusts and uses, as in the said act of parliament are mentioned, touching the said trust-estate.' But the report takes no notice of the reference relative to the payment of the debts on the estate of Lee.

This report was affirmed by decree of the Lord Chancellor, and, in consequence thereof, the funds were made over to the Countess of Forfar, and continued with her till John Lockhart came of age. In the 1728, an account was settled between the Countess and him, of her intromissions with the trust-funds; and the Countess having transferred the whole of the funds in her hands to John Lockhart, obtained a discharge from him of all intromissions, 'and of the said assignment of trust itself, and all that hath followed, or may follow thereupon, for now and ever.'

Lady Forfar died in the 1741. Anne and Dorothy Lockharts both predeceased their brother; Dorothy unmarried, and Anne Lockhart leaving an only child, Robina Pollock, since married to Sir Hugh Crawford.

John Lockhart died in the 1775, without issue; and by his settlements, his whole personal estate, and all his real estates not entailed, were conveyed to his wife, or to trustees for her behoof.

Upon the death of John Lockhart, Lady Crawford and her husband brought an action, in which they called the widow, and other disponees of John, and the legatees of the Countess of Forfar, concluding to have it found, That the pursuer, Lady Crawford, is now entitled to the benefit of the said trust, and that the defenders ought to be decreed to pay over the capital of the trust-funds to such persons as the court shall name, to be laid out in the purchase of lands, to be settled upon the said pursuer, and the heirs of her body, whom failing, to her heirs whatsoever.

A preliminary objection made to the competency of the court by the defender, that the question could only be tried in the court of Chancery, was repelled by the Lord Ordinary, and his judgment was acquiesced in.

On

On the merits of the cause, the plea maintained by the pursuer was, that the trust-funds, which were, by the transaction 1728, transferred to John Lockhart by the Countess of Forfar, came into his hands subject to the uses of the trust: That, by the act of parliament, the funds were settled in such manner, that the entail of the money itself, and the lands to be purchased with it, could not be defeated, nor the remainder, upon which the pursuer claims, barred, without making a purchase of lands in England, and the tenant in tail suffering a recovery, according to the form of that law. But as no purchase was made, nor recovery suffered, John Lockhart had no more in him but an estate tail; and the right of the pursuer remains.

Pleaded in defence against this claim: *1mo*, By the transaction in the 1728, Lady Forfar was discharged of the trust, and the money paid over by her to the heir of the marriage. The funds transferred to John Lockhart became his property, and as much at his disposal as any other part of his effects, the whole of which were conveyed by his settlements to his wife.

A fine and recovery was not necessary to vest the fee-simple of these funds in him. The contrary doctrine supposes, that the money of this fund could only be laid out on lands in England, to be settled under an English entail. But, by the original deed of trust, the trustees are empowered to lay out the money on lands either in Scotland or England. The act of parliament was no more than a ratification of that trust.

Suppose the money had been employed by the trustee in purchasing lands in Scotland, a fine and recovery, in the Court of Chancery, would have been entirely nugatory; and, if the heir had been under any fetters, could have had no effect to relieve him, as the jurisdiction of that court does not reach to this country.—But, if a purchase in Scotland had been made, and the lands settled in a manner agreeable to the trust, the unlimited property of the lands would have vested in Mr Lockhart of course. The trustee, in following out the purposes of the trust, must have put these lands under such a settlement as is usual in Scotland, for securing an estate on the heirs of the marriage. For that is the settlement in this country, which corresponds to the English entail, under which, lands purchased with this money, in England, must, in terms of the trust, have been settled. The only difference is, that, in England, a piece of form is necessary to vest the fee-simple of the subject in the heir. In Scotland, it follows from the nature of the right. The father is fettered; but, when the heir succeeds, the marriage-contract is implemented, and the substitutes have only a hope of succession, which may be defeated at the pleasure of the heir.—As, therefore, John Lockhart, the heir of the marriage, would have taken the subject in fee-simple, if the money had been laid out on land in Scotland, it can make no difference, that the money itself was paid over to him, instead of being so laid out. The trust, by allowing the fund to be brought into Scotland, and employed for purposes there, did, of consequence, relieve the heir from the necessity of using a fine and recovery; and the trust received its full effect when the funds were delivered up to the heir of the marriage.

2do, The right of the pursuer to insist in this action, is cut off by the negative prescription, whatever title the substitute heirs might have had in the 1728, or within 40 years of that period, to insist upon a strict execution of the trust. It is of no consequence in this question of prescription, how far the transaction betwixt the trustee and John Lockhart was regular, or whether a fine and recovery would not have been advisable.—It is sufficient that the trust was then *de facto* given up and discharged; and, as no challenge was brought of that transaction for the years of prescription, nor action to implement the trust, the pursuers, by neglecting to prosecute their right, have lost it; for an action to implement a trust may be cut off by the negative prescription, as much as any other.

Answered for the pursuers, to the *first* defence: Lady Forfar received this fund under the authority of the Court of Chancery, as a trustee, for the purpose of employing it in terms of the act of parliament: That is, in the purchase of lands to be settled by an English entail to certain uses. This could only have been done by a purchase of lands in England.—Lands purchased in Scotland could not have been settled under an English entail, and the trustee had no power to substitute any kind of settlement in place of the English entail. Every other way in which the funds might be disposed of, could only be considered as an interim employment of the money by the trustee, until the precise terms of the act were complied with.

But as, in fact, no purchase of lands was made by Lady Forfar, the trust-monies remained in her hands under the English entail, to which they were subjected by the act of parliament. This entail the trustee had no powers to disappoint, nor to apply the capital of these monies in any other manner, except to the single purpose of purchasing lands, to be settled as the act requires.—It was, therefore, *ultra vires* of the trustee to convey the unlimited property of these funds to John Lockhart, and could confer no right on him, nor operate as a discharge of the trust. She remained, notwithstanding thereof, obliged to employ the funds in the manner directed by the act; and John Lockhart could in no other way acquire the fee-simple of the subject, but by a fine and recovery.

To the *second* defence: The argument of the defenders rests on the hypothesis, that, by the transaction in 1728, the trust-money was discharged of the entail, and was in the hands of John Lockhart, in fee-simple.

That transaction cannot have this effect. It will not be presumed to have been the intention of parties that it should; because such a purpose would imply a tortious act, and a breach of trust. But, whatever their intention was, John Lockhart could not, by any discharge in favour of the trustee, remove the entail attached to the trust-fund by the act of parliament, which the trustee had no power to give up. Having right to the interest of the funds, he might discharge the trustee of these; but, as to the capital, his discharge can have no other operation, but, upon the warranty of it, to fix the money upon him, and oblige his representatives to relieve Lady Forfar, and
E
her

her heirs.—He was merely custodiar of the money for his own use during his life, and then to be made forthcoming to those in remainder.—In this question of prescription, the capital must be held as in Lady Forfar's hands; the trust continued with her, and the substitute heirs had no interest to insist that the fund should be laid out on land, as their rights in it were equally well secured while it remained in money.—Prescription, therefore, cannot run sooner than from the death of Lady Forfar in 1741.

But the substitute heirs had not the beneficial right or interest in this money even at that time, nor until the death of John Lockhart, without issue, which opened the succession, in this trust-fund, to the pursuers. It was only on his death, that they came to have any right to demand either capital or interest. Previous thereto, though it had been competent for them to have insisted for a literal compliance with the trust, and that the money should be laid out, in terms of it, they could have had no benefit from such action: As, immediately after a purchase made, John Lockhart, by using fine and recovery, could have cut off their right as heirs in remainder.

The prescription, therefore, runs only from the death of John Lockhart; for, until that time, the pursuers were *non valentes agere cum effectu*.

Replied for the defenders: The plea of *non valens agere* does not apply.—The pursuers in this case, as creditors under a trust-right, had a *jus quæsitum* to make it effectual from the beginning.—And they had a right to challenge every deed of the trustee in contravention of the trust.—It is of no consequence in this argument, that, if the action had been brought against John Lockhart, the pursuers, though successful, might have been deprived of any benefit from it, by his using a fine and recovery. The chance of this was a prudential reason for risking the prescription of the right, rather than bring an action during his life. But, as there was no defect of title in the pursuers, and the *jus exigendi* was clear, there is no room for the plea of *non valens agere*.

This cause was advised upon informations, and a hearing in presence.—The Court were of opinion, that both defences were well founded.—The judgment was, ‘ Sustain the defences to the action, ‘ and assoilzie the defenders.

Aët. Advocate, Solicitor General.

Alt. Hay Campbell. Craig.

No. VIII.

January 29. 1778.

JAMES FREELAND, and others,

Against

The INCORPORATION of WEAVERS in Glasgow.

An exclusive privilege to carry on the webster-craft found to reach to silk-weaving, though not in use at the time of the grant.

THE incorporation of weavers in Glasgow, by their seal of cause from the town in 1528, ratified by a charter from the crown in 1681, are vested with the exclusive privilege of carrying on the 'webster-craft' in that borough.

At a period long subsequent to these charters, the manufacture of silk-cloth was introduced into Glasgow; and afterwards, manufactures of mixed cloths, composed of silk with linen, or cotton, were also introduced.

James Freeland, and others, engaged in the business of weaving these manufactures within the town, though not entered freemen of the incorporation.—The incorporation of weavers brought a declarator for ascertaining their exclusive right to weave the cloth in question within Glasgow.

Pleaded in defence for the unfreemen: The exclusive privileges of incorporations being restrictions on trade and improvement, are to be strictly interpreted.—Silk-weaving, a new manufacture, not known in Glasgow till long after the seal of cause to the weavers, and ratification of it, is not reached by these grants.

This seal of cause requires, that the person admitted be found 'a sufficient, expert tradesman of the craft.'—When silk-weaving was introduced, none of the craft at Glasgow were capable to try a silk-weaver's sufficiency in his art, which is totally different from theirs. The craft, therefore, could not, in consistence with their own seal of cause, have demanded that a silk-weaver should enter with them. Though a few have of late entered voluntarily with the craft, that will not give them any right to oblige others to enter with them which they had not before.

Pleaded for the incorporation: The seal of cause is conceived in general terms, comprehending every branch of weaving, not limited to such only as were practised at Glasgow at the time of the grant. It is of no consequence, therefore, that silk-weaving was introduced posterior to the grants, which is the case with most of the other branches of weaving now in use there, confessedly reached by these grants.

The

The freemen of the craft were always sufficiently qualified to try the skill of the filk-weavers in the art of weaving, the general principles being the same in weaving filk as other materials. Now that there are actually many of the freemen filk-weavers, there is no reason whatever for an objection on this ground.

The Court found, that the ' defenders are not entitled to carry on ' the business of filk-weaving within the borough of Glasgow, without entering with the incorporation of weavers.

For the incorporation, *Craig, Morthland.*

Alt. Rat.

No. IX.

February 10. 1778.

D A V I D B E T H U N E,

Against

P A T R I C K J E R V I C E.

Right of the landlord to shell-marle found within the farm.—And to work such marle during the lease.

PATRICK JERVICE possessed the lands of Incharvie under a lease from Mr Bethune, by which the tenant had liberty ' to win lime-stone upon any part of the said lands where they could be most conveniently had.'

During the currency of the lease, a bed of shell-marle was discovered on this farm. The landlord being interrupted in working it by his tenant, brought a declarator of his exclusive right to this marle, and to the working of it during the lease.

In this action, the Lord Ordinary found, ' That the property of the ' marle in question belongs to the pursuer, and that the defenders have ' no right or title to work, use, or dispose, of the said marle: That ' the defenders did wrong in interrupting the pursuer in working the ' said marle, and in working and using thereof themselves.'

Pleaded for the tenant in a reclaiming petition, *imo*, That he had right to lay this marle on the lands of the farm for their improvement:—Admitting that he had no title to carry the marle off the farm, or to use it in any other way.

The contract of lease implies a right in the tenant to this extent, over all natural manures found within the ground. Marle is only to be considered as a richer species of soil: The tenant must be allowed to mix this soil, as a manure, with any other, for the better cultivation of the lands, in the same manner as he mixes a sandy with a clayey soil for that purpose.

If

If the tenant attempts to abuse this right, by laying on too much marle, or by over-cropping after it, the landlord has the same remedy as against over-liming, mislabouring, or any other kind of husbandry pernicious to his property. But the possibility of mismanagement is not sufficient cause for excluding the tenant altogether from so useful a mean of improvement, and would equally apply to exclude the use of lime or marle purchased from a third party.

In this case, the tenant having a special power to win lime-stone, the inferior right of spreading marle is implied.

2do, Though the landlord were entitled to the exclusive property of this marle, he cannot work it, nor cut the ground with roads for that purpose, during the currency of the lease.

The landlord insisted, 1mo, That he had the exclusive right to all shell-marle found within the farm. The lease imports only a temporary right to the yearly fruits of the soil, and extends not to minerals, or any substance found in beds or mines different from the soil; Stair, b. 2. p. 9. § 31.; Dictionary, v. 2. p. 423.

Shell-marle is a substance as distinct from the soil as coal or lime-stone, and found, like these, in a separate bed. Being no part of what is let to the tenant, he can no more work these substances for purposes within the farm, than for those without it. If he needs them for the use of his lands, he must purchase them from the landlord, whose exclusive property they are.

Shell-marle being a substance different from the soil, it could have no effect on this question, though the tenant had a right to mix one soil with another. But, even in that case, if the landlord can qualify a beneficial interest in the preventing of it, and his objection is not emulous, it may be contended on sound principles, that the tenant would not be allowed to transport one soil to lay upon another.—Shell-marle is a substance *in commercio* as much as lime or coals. It is, therefore, not emulous on the part of the landlord to oppose the tenant's depriving him of this beneficial property.

The power of winning lime-stones, given by the lease, implies no right to work marle, which is a different substance.

2do, The landlord having the right to the marle, must be entitled to work it during the lease, on paying the tenant's damages for the roads, &c. though there be no reservation to that effect in the lease: As was expressly found, in the case of a coal-mine, Hamilton, 21st June 1768.

Observed on the bench: Clay-marle, and shell-marle, are of a different nature. The latter is as much a separate substance from the soil as a quarry of lime-stone, and the tenant has no right, in virtue of his lease, to take and use it without a special power for that purpose. Whether he may take clay-marle, or any part of the soil, and put it upon another, without the landlord's consent, it is not necessary to determine in the present question.

The Court adhered.

Adv. Ilay Campbell, John Anstruther.

Adv. Geo. Wallace.

No. X.

February 10. 1778.

WILLIAM MORRISON, and others,

Against

JAMES HAMILTON, and others.

Mariners' wages where the ship is wrecked.—Import of a contract relative to the wages.

IN May 1773, James Hamilton, and others, mariners, engaged with Morrison and company, to navigate their ship Rae-galley in a voyage from Greenock to the Lewis: From thence to Philadelphia; thence to the bay of Honduras; and from thence to return to Greenock.

Articles of agreement were signed by the mariners, among which were the two following: 'No officer or seaman in the said ship shall demand, or be entitled to his wages, or any part thereof, until the arrival of said ship, at the above mentioned port of discharge in Greenock.' And, 'No wages to be paid till the vessel arrives at Greenock.'

The ship proceeded on the voyage, unloading and shipping cargoes at all the different ports, until her arrival at the bay of Honduras, where the vessel took in her fourth cargo; but, soon after sailing, was totally wrecked. The mariners having returned to this country, brought an action against their employers, Morrison and company, for payment of their wages, from the time of their leaving Greenock, until the ship was wrecked.

The judge-admiral found, 'That the pursuers are entitled to their wages to the time of their finally unloading the said ship the Rae-galley in the bay of Honduras.'

The merchants having brought the cause into court by suspension, the Lord Ordinary found the letters orderly proceeded. Against which judgment they reclaimed.

In this case, the same point occurred which was determined in the similar case of Ross against Glasfoord in the 1771, that the mariners, at common law, in such a voyage, are entitled to their wages until the delivery of the last cargo before the ship is wrecked. This was again disputed by the merchants, on the same principles and authorities as then argued.

Pleaded separatim for the suspenders: The mariners are, at any rate, barred by the terms of the agreement, which they subscribed before sailing, from any claim for wages, which is thereby made to depend on the vessel's returning to Greenock.

Answered

Answered for the chargers : The only meaning of these articles was to prevent the mariners from demanding their wages at every port they arrived at, which, at common law, they were entitled to do. They are only suspensive of the term of payment, and proceed upon the hypothesis, that the ship was to return. The last article, in which it is said, ' no wages is to be paid,' &c. explains and qualifies the first. These articles, therefore, ought not to be interpreted into a forfeiture of the wages which the mariners had earned, and would have had right to at common law.—But, although they could bear no other interpretation, such a contract would be voided as unjust, and taking undue advantage of the mariners.

The Court were of opinion, that the written articles founded on do not apply to this case, where the ship is wrecked and cannot return : That the claim of the mariners must be judged of by the common rules of law, by which they are entitled to wages until the unloading the vessel in the bay of Honduras.

The Court adhered to the Lord Ordinary's interlocutor, which found in the same terms with that of the admiral.

Aët. Ad. Rolland.

Alt. J. Campbell, Cha. Hay.

No. XI.

February 12. 1778.

JAMES BURNET,

Against

WILLIAM RITCHIE.

Effects of an obligation to account for bills indorsed.

ANDREW GRAY merchant in Aberdeen, became bankrupt 16th January 1776.

A short time before his bankruptcy, William Ritchie, and others, in order to support his credit, obtained for him L. 1500. The money was advanced to Gray by Messrs Dingwall and Fordyce, to whom Ritchie and others gave their acceptance for the whole sum.

On this account Gray, (Jan. 10.) indorsed to Ritchie, and the others who had given their acceptance, bills amounting to L. 1531:14:9. A list of these was made up under this title : ' Inventory of bills lodged ' in the hands of William Ritchie.' And a docquet is subjoined, in which they acknowledge the receipt of these bills from Gray, ' as surety and relief to them,' for their acceptance to Dingwall and Fordyce, ' and oblige themselves to apply the money to the extinguishing said debt, and to return the overplus, if any be, to you, you always being ' obliged to indemnify us, if the money arising from said bills falls ' short of paying the foresaid debt.'

After

After Gray's bankruptcy, Ritchie gave a charge to Burnet, acceptor of one of the bills, for payment. In a suspension of this charge,

Pleaded for Burnet : That he ought to be allowed deduction of certain partial payments made to Gray, which, though not marked on the bill, are vouched by missives and receipts.

It appears from the expressions used in the title and docquet of the inventory, that the bills were only lodged with Ritchie for security, not in payment of his acceptance to Dingwall and Fordyce.

The nature of the transaction likewise implies it : Whether there is an overplus or a shortcoming, the parties being respectively obliged to account to each other for the balance.

Answered for the charger : It is evident from the transaction, that the money advanced to Gray was the money of Ritchie, and others who borrowed it on their own credit. Gray never gave any acceptance to Dingwall and Fordyce for this money. The bills, therefore, were indorsed for payment of value instantly received from Ritchie and others. To the extent of that value, and until it is paid, they are onerous indorsees in these bills, and not obliged to admit any payments not marked on the bills.

The stipulations in the docquet do not aid the suspender's plea. After the value given for the bills is recovered, the charger, and others, no doubt, would only be indorsees in trust as to any balance, and accountable to Gray for the surplus, if recovered. This is the import of the docquet, which affects not the onerosity of the indorsation to the extent of the value given.

It was said, that such transactions as this are common among merchants ; and the indorsees always understood, in practice, to be onerous until the value is paid.

After the court had pronounced two consecutive judgments in favour of the chargers, it was discovered that Gray had indorsed to Ritchie, a few days after the first indorsation, bills to the amount of L. 355, for the purpose of answering partial payments made on the former bills, not marked on them, but vouched by separate documents. Upon which the court pronounced this judgment :

' The Lords adhere to their former interlocutor, finding, that the charger, in consequence of the transaction 10th January 1776, was an onerous indorsee to the bills in question ; but find, that, as the transaction was explained by the second list of bills indorsed to the charger, he is bound to admit the partial payments made by the suspender.'

For Burnet, *Ad. Rolland.*

Alt. Neil Ferguson.

No.

No. XII.

February 11. 1778.

GRIZEL BARTHOLOMEW, and others,

Against

PETER CHALMERS.

Jurisdiction of the admiral court.

HENRY STEEL, master of a vessel, having died on a voyage to Grenada, Chalmers the mate came to have the command, and intromitted with the whole effects of Steel on board the ship. Bartholomew and other representatives of Steel, pursued Chalmers before the admiral, to account for his intromissions with these effects.

The admiral ordained the defender to find caution *judicio fisci et judicatum solvi*.

Chalmers brought this cause into court by advocacy.

The pursuers insisted, That the cause was strictly maritime ; because the *locus quasi contractus* was on shipboard, the intromission being made there.

Answered for the defender : It is established law, that the privative jurisdiction of the admiral is not founded either on the *locus contractus* or *quasi contractus*, but solely on the cause being of a maritime nature, which this action is not ; Campbell against Montgomery, 8th February 1765.

The court found ‘ this cause not to be maritime, therefore advocate.’

For Chalmers, *Robertson*.

Alt. *Claud Boswell*.

No. XIII.

February 11. 1778.

MARY NASMITH,

Against

COMMISSARIES of EDINBURGH.

Right of the executors to have part of the effects confirmed, though the whole are inventoried and appreciated.

THE whole effects of a defunct being inventoried and appretiated, by the commissaries, a partial confirmation, to a small amount, was demanded by the executrix, Nasmith, which the commissaries refused to grant.

The Lord Ordinary refused a bill of advocation against this judgment; but, upon advising a reclaiming petition and answers, the court were of opinion, that the commissaries are obliged to grant confirmation upon any part of the defunct's effects that shall be offered them for that purpose. This judgment was given upon the same grounds as in the case of Agnes and Jean Brodies *contra* the commissary-depute of Murray, 10th August 1753. The only difference betwixt the two cases was, that, in the former, a partial inventory of the effects had only been made, to the extent of which the confirmation was demanded. This was not considered by the court as forming any distinction of consequence betwixt that case and the present.

The Court 'remitted the bill of advocation to the commissaries, with instructions to allow the confirmation to proceed, as craved by the petition.'

For Commissaries, Solicitor General.

Alt. C. Hay.

Clerk, Tait.

No.

ANDREW WELSH,

Against

JAMES WELSH, and others.

Curators removed as suspect.

ANDREW WELSH became security for the curators of Nathan Cornfoot, viz. Elizabeth Robertson, mother to the minor, and James Welsh, her second husband, curators chosen by the minor.

Andrew Welsh, apprehending danger to himself, and the minor, from the bankruptcy of James Welsh, soon after his nomination, and the mismanagement of the minor's effects by both curators, required the minor, and his nearest of kin, under form of instrument, to bring an action for having his curators removed as suspect, offering to be at the expence of the action, and of new to become bound for any responsible persons to be chosen in their room.

This not being complied with, the cautioner himself brought an action, calling the curators and the minor, and his next of kin, for having it found, that, in respect of this requisition, he was no longer liable in the cautionary obligation: And, in behalf of the minor, inserted a conclusion, that the curators should be removed as suspect.

The cause was advised on an information *ex parte* for the cautioner; but the minor, and his curators, had appeared, and litigated before the Lord Ordinary.

The court had no doubt that Andrew Welsh was entitled to be relieved of his cautionary obligation *in futurum*. But a difficulty occurred, how far the action to remove these curators as suspect, could be sustained, in the law of Scotland, at the instance of Andrew Welsh, who was no relation to the minor:—Though, by the civil law, this was *actio popularis*.

Observed on the bench: When a minor names curators, it is *pars judicis* to require caution, whether the minor, and his next of kin, demand it or not. As the court, therefore, have, in this case, relieved the cautioner of his obligation, it is a consequence of the judgment, that the curators must be required to find new caution by the court; and, if they do not, that they should be removed.

The court ‘ found Andrew Welsh free of his cautionary obligation
‘ from the date of his protest and requisition, and in time coming.
‘ And, in respect of the above, ordain the curators, on or before the
‘ 24th current, to lodge in process a bond, with a sufficient cautioner,
‘ or cautioners, for the faithful administration of the minor's estate
‘ during

‘ during the curatory ; with certification, if they fail in lodging the
‘ bond, the Lords will remove them from their curatory.

The curators having failed to lodge the bond, the court ‘ removed
‘ them from their office as suspect.’

A&A. G. Ferguson.

No. XV.

February 14. 1778.

J O H N M ‘ D O N A L D, of Braickish,

Against

J O H N M ‘ D O N A L D of Clanranald, and his tutors and curators.

Objection to a deed not mentioning the number of pages.—Not stamped.

IT was objected by Clanranald, to the validity of an agreement entered into between his father and M'Donald of Braickish, by which his father became bound to grant a lease for three nineteen years of the island of Canna to Braickish.

Primo, That, although the deed is wrote book-ways, yet it does not mention, in the testing clause, the number of pages of which it consists; nor are the pages numbered, both of which are required by the statute 1696, cap. 15.

Secundo, It is not wrote on stamped paper, as required by the statutes 12mo An. c. 9. § 21. 3d Geo. I. c. 7. 30th. Geo. II. c. 19. which provide, that certain deeds, such as charters, bonds, leases, &c. shall be written on stamped paper. Although it contains a clause, obliging the parties to extend it on stamped paper, that does not remove the objection. Action must be denied upon it, otherwise the revenue of stamp-duties would be disappointed altogether. Neither can the objection be taken off by stamping the deed. After production, and being founded on in judgment, no defect in the writing can be supplied.

Answered for the defenders, to the first objection: This deed is wrote only on one sheet of paper, and the testing clause commences on the end of the second page. The statute 1696 applies only to the case where deeds are written on more than one sheet. So it was found, Robertson *contra* Kerr, 7th January 1742, Kilkerran.

To the second objection: This is not one of those deeds specified in the revenue statutes establishing stamp-duties. It is not a lease, but only an agreement to grant a lease. But, if it did require stamping, the objection could be removed by getting the stamp still adhibited, upon paying the usual price.

‘ The

‘ The Lords repelled the first objection to the pursuers title of action founded on the act 1696 :—But, as to the second objection, lists process until the agreement is duly stamped in terms of law.’

A^d. *Frazer.*

Alt. *Campbell.*

No. XVI.

February 14. 1778.

JAMES CAMPBELL, and others,

Against

JANET SOMERVILL.

A postnuptial provision by a husband, obæratu, on his wife, how far good against creditors.

ROBERT JAFFRAY, in his contract of marriage with Janet Somervill, became bound to provide her in an annuity of L. 25, Sterling, in case of her surviving. Soon after his marriage, upon a narrative of ‘ love and regard,’ he executed a liferent-conveyance of a house in favour of his wife. Robert Jaffray died, in a few months after executing this deed, in Jamaica, leaving his affairs much involved. His effects in Scotland not being sufficient to pay his creditors, they brought a reduction of the foresaid disposition of the liferent of the house to the widow, upon the act 1621.

Pleaded for the pursuer : Jaffray died insolvent, and was in the same situation at the time of granting this deed. Where a wife is otherwise unprovided, a postnuptial settlement in her favour will be good to the extent of a rational provision, even when the husband is *obæratu* at the time of granting it. But it will not be supported by the court, if immoderate, against onerous creditors; Kilkerran, *voce* Bankrupt, No. 4.; Noble against Dewar, 12th July 1758; Erskine, b. 4. tit. 1. § 33.—In the present case, the wife was provided in the contract of marriage. This ascertained what the parties considered to be reasonable in their circumstances. Every addition thereto, by a postnuptial deed, after the husband is *obæratu*, must be held as immoderate; February 7th. 1761, Bruce against Glen.

Answered for the defender : There is no certain evidence of the husband’s insolvency at the time of granting the deed. But, although he had been insolvent, this deed was granted for a just cause, and, therefore, is not reducible. It is only an addition to the defender’s jointure, of a small house at L. 4 rent, in which to live with her family. This case, therefore, differs from those founded on by the creditors, in all of which the provisions were immoderate. The only question,

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with respect to such provisions, is, Whether they are exorbitant or not? and it makes no difference, if they are moderate, whether they are additions to a former scanty provision by the marriage-contract, or granted when there has been no former provisions.

The court found, ' That Janet Somervill's liferent-right to this tenement, is to remain in security to her of the annuity in her contract of marriage; but reserved to her, in case of her husband's debts being paid by the proceeds of his effects at Jamaica, or elsewhere, to claim the liferent-right as a separate provision.'

Aff. Matthew Rofs.

Alt. Ad. Rolland.

No. XVII.

March 3. 1778.

MARQUIS of TWEEDALE,

Against

HUGH DALRYMPLE, and others.

Hunting within the inclosures of another, against his will, not lawful.

THE Marquis of Tweedale brought an action against Mr Dalrymple, and others, in which he charged them with having broke into his park of Yester, with horses and hounds, either in pursuit of game, or to search for it. The chief object of the action was to have it found and declared, ' That neither they, nor any person, has right to hunt game within said inclosures without leave of the pursuer.'

The defenders admitted, that they were liable for reparation of all damages done by them on the grounds of others, in the course of the sport; but insisted, that, as they were possessed of the legal qualification, they were entitled to hunt on all grounds without restriction. In support of this defence,

Pleaded for the defenders: Animals *feræ naturæ* are *res nullius*, and, wherever they are found, every one is equally entitled to acquire a property in them by occupancy. Hunting these animals, therefore, without express enactment in its favour, is free and common to all, in as far as municipal law has not denied or restricted the use of it.

The antient law of Scotland left the exercise of hunting, without restriction, to the whole inhabitants; *M. T. C. B. c. 52.* Forests and warrens are mentioned as exceptions, into which game could not be pursued; and the exception confirms the general rule, that game could be followed on every other property.

Hunting and hawking are favourites of the law, and considered in our ancient statutes as the only lawful method of killing the game.

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The old acts for preserving the game proceed on this principle.—Guns, bows, and all other methods, are prohibited, a. 1551, c. 9.—1555, c. 58.—a. 1597, c. 270. And, when killing game by fowling-pieces and pointers was admitted of, yet it was under the severe restrictions of the a. 1685, c. 20. But hunting, encouraged by law as a manly exercise, was not denied to those excluded by this statute from fowling. No qualification is at this day necessary to hunting, but that required in the act 1621, c. 21. ratified by the act 1685, c. 20. viz. the having a plow of land in heritage.

Where a right is given by the law, what is necessary to make it effectual is presumed to be given. To render effectual the right of hunting, thus recognised by the statute, it is necessary that the qualified persons should at least be entitled to follow the game into the fields and inclosures of others, where the chase leads, if not to search for game there. This is requisite to any exercise whatever of the sport.—If it is denied, the right of the qualified persons to hunt is entirely defeated.

Usage supports the plea of the defenders. During the many ages in which hunting has been universal, no such challenge as the present has ever been made.

It was pleaded, as a favourable speciality, that the defenders were in pursuit of a fox; and only hunted foxes, which are noxious animals.

Answered for the Pursuer: The right of property in a subject implies the exclusive use of it. No one is entitled even to range over open fields, if the owner refuses to allow him that use of his property, still less to enter inclosures. The proprietor, by inclosing his grounds, *rebus ipsis et factis*, prohibits the entering into them without his leave. These are the general principles flowing from the nature of property. The question is, Whether common law, or statute, has established an exception in favour of hunting?

In the Roman law, it is expressly laid down, that no one has a right to hunt on the grounds of another, without the owner's leave; l. 1. § 1. § 9. *A. R. D.* The owner of the lands had no property in the game itself.—But hunting game on his lands was an use of them, which his right of property entitled him to prohibit any person from usurping, without his consent.

The common law of Scotland is the same; *Craig, l. 2. dieg. 8. § 13.*; *Stair, b. 2. t. 3. § 76.* Hunting was no doubt common to all in this respect, that, where the proprietors of the lands gave no obstruction, the law made no distinction of persons. High and low were equally entitled to hunt, until the act 1621, c. 31.

This statute deprives the excluded persons of the exercise of the sport itself, so that they cannot hunt even on their own grounds. But no new right is bestowed on the qualified persons. The benefit of the act, as to them, is entirely negative, in not depriving them of what right they had at common law, previous to the act. But, as they had none to hunt on the grounds of others without their leave, they have as little to insist for that privilege after the act as before it. Nor is it any argument, that, without being allowed to pursue the game into the property of others, the sport may be baffled. All that follows from this is, that,

that, besides the permission of the legislature to the sport itself, it is necessary, in order to the effectual exercise of it, to have the permission of the proprietor of the grounds where it is to take place. This is requisite where even the most useful occupations favoured by law are to be exercised on the property of others.

As hunting is a favourite amusement, it meets with no obstruction from proprietors. But no right can be founded on such permission. Were it a known servitude, hunting on the fields of one could never establish any right over the fields of another. But no such personal servitude over lands is known in the law, or acquirable by usage. The proprietor is, at any time, entitled to prohibit this trespass on his property, however much he may have formerly overlooked it.

In so far as respects the hunting within inclosures, property is not only protected by common law, but by statute. The act 1555, c. 51. anent hunting and hauking, ratified by act 1685, c. 20. provides, 'That no person range other men's woods, parks, hainings, dikes, or brooms, without licence of the owner of the ground.' Penalties are annexed by the act for the transgression of it; and it is renewed and ratified by the act 1685, c. 20.

It is of no consequence that the fox is a noxious animal. The object in hunting is the sport, and not the destruction of these animals, for which other means are more effectual. The statute 1555, c. 51. makes no distinction whether it is fox or hare that is hunted.

Where inclosures are broke into in this manner, the pecuniary loss may be but a small part of the injury sustained. Mischief done to favourite objects of improvement and ornament, young plantations, &c. cannot receive an estimation. Reparation of the pecuniary damage, therefore, is not sufficient. The pursuer is entitled to have this invasion of his property declared unlawful. He can then take such means to prevent it for the future, as every one has a right to use in defence of his property.

Replied for the defenders, to the pursuer's argument from the act 1555, That, although it might meet the defenders claim, in so far as relative to the searching for game within inclosures, yet, it ought not to be extended to the following game thither, to which it was said the word 'range' in the statute did not apply.

This cause was advised on memorials, and a hearing in presence.

The court were of opinion, That the act 1555 extended to the following, as well as searching for game; and, being a subsisting statute, ratified by act 1685, c. 20. was sufficient for the decision of the present question, relative solely to the right of hunting within the inclosed grounds of another, against his will. The Court found, 'That the defenders were not entitled to enter or come into the deer-park, or other inclosures of the pursuer, without his consent, either for hunting or following game, or drawing cover, and searching for game.'

Adv. Sol. General, Hay Campbell.

Adv. Crosbie, Brown, M'Cornick.

No. XVIII.

March 4. 1778.

JOHN SPOTISWOOD,

Against

ARCHIBALD M'NEIL.

A bill protested for not payment equivalent to an intimated assignation, though arrestment used on it in the hands of the person on whom it is drawn.

GRAHAME being indebted to Spotiswood, gave him a bill for the money on M'Tavish his debtor. M'Tavish refusing to accept, the bill was duly protested for non-acceptance, and afterwards for non-payment, 1st May 1775.

Thereafter Spotiswood and his attorney raised diligence on the bill, and arrested in the hands of M'Tavish, 30th October 1775, and brought a forthcoming. Archibald M'Neil, a creditor of Grahame's, likewise arrested in the hands of M'Tavish, 17th September 1775, upon a depending action against Grahame, in which he afterwards obtained decret.

A competition ensued betwixt Spotiswood and M'Neil, as to their preference to the funds in M'Tavish's hands, in the course of which Spotiswood repeated an action against M'Tavish for payment.

Pleaded for Spotiswood: Grahame's bill on M'Tavish, and the protest for non-payment, are equivalent to an intimated assignation, and, therefore, must be preferable to M'Neil's arrestment, which is posterior to the protest.

Pleaded for M'Neil: If Spotiswood had chosen to take the bill and protest as a virtual assignation, his action for payment lay against M'Tavish alone, as his proper debtor. He could not have had recourse against Grahame; for the only warrandice implied in an assignation, is that the debt exists, not that the debtor is solvent. But Spotiswood, by using arrestment in the hands of M'Tavish, rejected to rest on his security, and hold the bill as an assignation. The diligence imported, that M'Tavish remained debtor to Grahame, and that Spotiswood had still recourse on Grahame, which is inconsistent with the plea that he is assigned to the debt. M'Neil's arrestment being prior to that used by Spotiswood, he is preferable.

The court were of opinion, that the using of the arrestment afterwards, did not bar Spotiswood from pleading his preference on the bill and protest, as equivalent to an assignation intimated.

The judgment was, ' In respect of the bill drawn by Grahame, upon M'Tavish, presented to him for acceptance on the first March 1775, and protested against him for notpayment on the first of May thereafter, find John Spotiswood and his attorney preferable on the sums due by M'Tavish to the common debtor.'

For Spotiswood, *Solicitor General.*

Alt. Croftie.

No. XIX.

March 6. 1778.

N I C O L A S T H O M S O N,

Against

D A V I D M' C U L L O C H, and his Tutor *ad litem.*

Additional aliment due to the widow, when her terce is inadequate.

HENRY M'CULLOCH of Torhoufkie at his death left an estate in land, yielding L. 240 Sterling free income, after deducting the interests of all debts. He left no personal effects, and was only infeft in such parts of the lands as yielded a terce to the widow of L. 40. No marriage-contract had ever been executed betwixt him and his wife Nicolas Thomson, nor any settlement made on the younger children. An action of aliment was therefore brought at the instance both of the widow and of the younger children, against the eldest son David, to whom a tutor *ad litem* was appointed.

It was not disputed that the younger children were entitled to aliment from the heir and representative of the father. But, as to the aliment claimed by the widow, it was suggested, that, having a legal provision of terce, she was entitled to nothing more.

Answered: Where there are no conventional provisions, the widow is entitled to a maintenance out of her husband's estate suitable to the circumstances of it. This is the necessary consequence of the obligation on the husband to provide for his wife, which, if he does not, the law will do for him. If her legal provisions of terce and *jus relictae* are not sufficient, an addition to them must be made out of the estate.

The husband's effects may be so circumstanced at the time of his death, that no part of them can be subjected to the terce or *jus relictae*, as in the case of his leaving an heritable estate in which he was not

not infest, or bonds bearing interest : So that, if the widow was restricted to these legal provisions for her maintenance, she might be totally unprovided, while her husband's heirs succeed to great riches.

The widow is, in this case, the better entitled to this claim, that the heir is her own son, bound to aliment her *jure naturæ* ; Sir John Paterson of Eccles, 25th June 1751.

Observed on the bench, That, where there are no conditional provisions, the widow is entitled to an aliment out of her husband's estate suitable to its free income. When her legal provision of terce and *jus relictæ* are not adequate to this, she is entitled to an additional aliment out of it.

The court ' found the pursuer entitled to an additional aliment of
' L. 20 yearly, from the first term after the husband's death, for
' 19 years, or until the same is recalled or altered by authority
' of the court.'

Act. Al. Gordon 3tius.

Alt. Ilay Campbell.

No. XX.

March 6. 1778.

M ' K A Y,

Against

B A R C L A Y, and others.

Import of the act of federunt 1st February 1715, § 4.

M 'KAY was decerned to pay the expences of process by a judgement of the inner-house, and the accompt was modified. A reclaiming petition was presented for M 'Kay, praying to alter the interlocutor, in so far as to modify the accompt to a smaller sum. The court refused the petition, as falling within the intendment of the act of federunt 1st February 1715, § 4. discharging reclaiming petitions against judgments of the inner-house awarding expences.

G. Buchan-Hepburn.

No.

No. XXI.

March 7. 1778.

ROBERT OLIVER,

Against

JANET SCOTT.

Extent of an aliment due by a day-labourer for a bastard child.

THE justices of peace of the county of Roxburgh found Oliver, a day-labourer, liable to Janet Scott, a woman of the same rank, by whom he had a bastard child, in the sum of L. 4 Sterling, annually, of aliment for the said child, during her continuing to keep and maintain said child.

In a suspension of this judgment, at the instance of Oliver, the Lord Ordinary found that he was liable in that sum, annually, until the child should attain the age of 14 years.

But the court, in reviewing this judgment, were of opinion, that, for persons in his circumstances, the sum was too large, and the time too long; and, therefore, they 'restricted the quantum of the aliment to L. 3 in the year, to be paid quarterly, until the child should attain the age of seven years; and also, thereafter, until either that the father shall take the child into his own keeping, or that the child shall attain the age of ten years.'

For Suspendor, H. Erskine.

Alt. Adam Ogilvie.

No. XXII.

June 24. 1778.

PROCURATOR-FISCAL of the Lyon-court,

Against

WILLIAM MURRAY of Touchadam.

Jurisdiction of the Lyon-court.—Fees of Matriculation.

MR MURRAY was cited before the Lyon-court by the procurator-fiscal, for having assumed ensigns-armorial without matriculation, as required by the acts 1592, c. 127. and 1672, c. 21.
The

The precept concluded upon these acts for certain penalties, and for escheat of the goods and furniture on which the arms were represented.

The Lyon-depute having decerned in terms of the libel, Mr Murray brought the cause into the court of session by advocacy; in the discussing of which, two preliminary points occurred, Whether the Lyon-court was competent to this question;—and, if competent, Whether it was likewise privative?

The court ‘repelled the objection to the competency of the Lyon-
‘ court, and also repelled the plea of its jurisdiction being privative.’ Nov. 30:
1775.

The cause having been remitted to the Ordinary, his Lordship, after various procedure, found it proved, that the Murrays of Touchadam were in possession of a coat-armorial prior to the act of parliament 1592; and that, since the 1660, they had been in use to bear the supporters, crest, and device, they now bear: ‘that such long possession
‘ infers an antecedent right, and excludes all challenge of defect of
‘ such antecedent right: That William Murray was not in *mala fide*
‘ to continue the use of the armorial bearings which his predecessors
‘ enjoyed; and that there is no sufficient warrant for the penal conclusions of the original summons; and, therefore, assolizied Mr
‘ Murray, reserving to the procurator-fiscal to charge him to matriculate his armorial bearings in terms of the statute 1672, and to pay
‘ the fees exigible from a baron, and no more, as the said statute bears:
‘ And also, reserving to the officers of the said court to exact, further,
‘ a reasonable sum from Mr Murray, in case he chooses to be furnished,
‘ not only with a blazoning, in terms of art, but also with a painting
‘ in water colours, and other ornaments; these being things which
‘ the Lyon is not bound, by law, to provide without a suitable remuneration.’

The pursuers having reclaimed, the court adhered to this interlocu-
tor, excepting as to the fees exigible on matriculation, as to which Dec. 20.
1776.
‘ parties were allowed to be heard further.’

The pursuers alledged, that, as to the fees, subsequent usage, had derogated from the statute 1672, and had established higher fees. In support of which, eleven instances were condescended on, all within the last 20 years.

Answered: The statute regulates the fees only where the right to the arms to be matriculated is prior to the 1672, as in the present case. But, in the instances adduced by the pursuer, new grants, either of arms or supporters, were obtained from the Lyon, and, therefore, they establish no usage contrary to the statute.—These instances are likewise too few, and too recent, to ascertain the legal fees in any case.

The court found, ‘ That the Lord-Lyon can exact no higher fees
‘ for matriculating Mr Murray of Touchadam’s arms than ten
‘ merks, being the fees exigible by the statute 1672 from a baron.’

Act. Solicitor General, Ja. Boswell.

Alt. Rae.

No. XXIII.

June 25. 1778.

JOHN and JAMES WILSONS,

Against

HENRY LOCHHEAD.

Proceedings in absence before expiry of the induciæ.

JOHN and James Wilsons having brought an action for payment against Lochhead, called their summons, by mistake, before the last diet of compearance, and got a decret in absence. Having discovered the error, they called it anew after the *induciæ* were run, and obtained decret in absence.

Lochhead, in a reduction of this decret, among other grounds, insisted that it was void, on account of the former irregular proceedings. By calling the summons, and obtaining the decret before the *induciæ* were run, the authority of the summons was exhausted, and the pursuers could not thereafter remedy the defect at their own hand, as the proceedings were the act of the court. They ought either to have raised a new summons, or applied to the court to rectify the error.

Answered for the defenders : The proceedings previous to the running of the *induciæ* must be held *pro non scriptis*, being intrinsically void ; and the authority of the summons to call for the defender's appearance, after the *induciæ* were run, remained the same as ever. It was sufficient that the pursuers passed from these proceedings ; and there was no necessity to make any application to the court to enable them to do so. There was no cause in the court, at the time, on which to found such application. Spence *contra* Smith, 25th February 1772.

The court were of opinion, That the pursuers were entitled to consider the proceedings previous to the running of the *induciæ* as intrinsically null, and to call their summons as if these had not existed ; therefore, ' repelled the reasons of reduction of this decret founded ' upon these proceedings.'

Act. Cullen.

Alt. Hay Campbell, Claud Boswell.

No.

No. XXIV.

June 26. 1778.

CHARLES GRIERSON,

Against

JOHN EWART.

Import of arable lands in the statute 1663, c. 21.

THE presbytery of Dumfries, upon the application of John Ewart minister of Troqueer, designed to him nine acres of kirk-lands, belonging to Grierison, for minister's grafs, on the statute 1663, c. 21.

Grierison brought a reduction of the presbytery's decret on this ground: That the lands designed fall within the exception of the act 1663: 'That, if there be no kirk-lands lying near the minister's manse, out of which the grafs may be designed; or, otherwise, if the said kirk-lands be arable lands, in either of these cases, ordain the heritors to pay the minister, and his successors, yearly, L. 20 Scots for the said grafs.'

The lands in question are arable lands; they were enclosed with dike and ditch 20 years before the designation, and have been producing either crops of grain, or rye-grafs and clover; consequently they cannot be designed.

Answered for the defender: By 'arable lands,' in this statute, are not to be understood all lands capable of being ploughed. The extent of this exception in the statute is explained by the mode of agriculture at the time. No lands, in those days, got the name of arable, but such as were kept constantly under the plough; and these were likewise called crofting lands; in contradistinction to which, were outfield grounds, ploughed at distant intervals of time. The object of the statute was only to exeem the crofting lands; and such is the interpretation the court has put upon it; Steele *contra* Dalrymple, 27th July 1748; Kilkerran, v. Glebe; Hodges *contra* Bryce, 27th February 1736. As the lands designed are not crofting, or arable lands, in this sense of the word, they do not fall within the exception of the statute.

These lands were entirely outfield 20 years ago, and at that time confessedly liable to have been designed. Though, by late improvements, they are brought into better cultivation, the minister ought not to be deprived of the right he then had to a designation of grafs out of them.

The court were of opinion, that, by arable lands, are to be understood lands in a continued state of cultivation, though bearing crops of

of grafs, and not constantly under the plough. That the question, Whether lands fall within the exception of arable in the statute? is to be determined by their condition at the time when the designation is applied for, however recently fuch lands may have been improved.

The Court ‘ fufained the reasons of reduction of the grafs-grounds.’

A&L. *Rae.*

Alt. *Crosbie.*

No. XXV.

June 30. 1778.

E A R L of H A D I N G T O N,

Against

The O F F I C E R S of S T A T E.

Title in the Lord of erection to the patronage of a church annexed to the benefice.

THE church of Coldstream having become vacant, two different presentations were given, one by the crown, and the other by the Earl of Hadington. The Earl soon after brought a declarator of his right of patronage, in which he called the officers of state.

Pleaded for the pursuer: The lands of Coldstream, and the churches therein situated, formerly belonged to a convent of Cisterians, and, upon the reformation, were annexed to the crown.

In the year 1621, an act passed for dissolving the priory of Coldstream from the crown, and erecting it into a barony in favour of Sir John Hamilton, third son of the Earl of Melrose; and this act was followed by a charter from the crown to him of the subject. Sir John, thereafter, conveyed the whole grant to his father, who was the predecessor of the pursuer.

In the act 1621, the subjects dissolved from the crown, are described to be the priory of Coldstream, and the benefice thereof, ‘ with all ‘ lands, kirks, teinds, &c. pertaining to the said priory, as well the ‘ temporality as the spirituality of the same; and specially, all and ‘ haill the lands, &c.; also the teinds, parsonage and vicarage, of all ‘ and fundry, the kirk and parish of Coldstream, pertaining to the ‘ said priory of Coldstream, as a part of the spirituality of the same, ‘ with all other kirks and teinds pertaining to the said priory, as spirituality thereof.’

As the teinds of the parish of Coldstream were part of the spirituality of the priory, the person serving the cure in the church of Coldstream, must have been a vicar named by the prior and convent.—

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The right of the ecclesiastical titular, in such a case, to supply the cure of the annexed benefice, was not, in strict language, a right of patronage; the titular himself being, in effect, parson of the parish, and the vicar only a substitute. But, when the large benefices were given away to lay titulars, this right of presenting to the annexed benefice became a proper right of patronage in the lay titular, and was exercised and transmitted as such; Sir G. M'Kenzie, Obs. on a. 1594, c. 196.; St. Inst. B. 2. t. 8. § 34.; Bank. B. 2. t. 8. § 18.—Under the terms, therefore, of the grant to the priory of Coldstream, above recited, the patronage of this church was effectually conveyed to the Lord of erection. The words 'advocation, donation, and right of patronage,' do not occur in the grant. But those used were more proper in the circumstances of the case. The crown's right being of the same nature with that which formerly belonged to the beneficed person, the proper mode of conveying it was under the general description of the kirk, and the teinds thereof. It was by having a right to these that the crown had the consequential privilege of naming an incumbent.

No particular words were necessary; the grant of the benefice, *per nomen universitatis*, includes all its parts and privileges, and, consequently, was sufficient to carry the patronage of this church; St. Inst. B. 2. t. 8. § 34.

Answered for the defenders: There is no conveyance of a right of patronage in the titles produced: There is not even any grant to the kirk of Coldstream *nominatim*. But, though a grant to this kirk were to be held as included under the general conveyance of kirks, such a grant carries the teinds or spirituality of the kirk, but not the right of patronage. It may be true, that, before ministers had right to the fruits, the Lords of erection, under the colour of this title to the kirk, may have put in vicars to serve the cure, as the ecclesiastical titulars were in use of doing: But, as soon as ministers came to have right, by statute, to a certain stipend out of the great teinds, the nomination to the office of minister was in the crown. It required an express conveyance of the *advocatio donatio ecclesiæ* from the crown, to vest the right of presentation in the Lord of erection, and it was not carried by his grants to the benefice. This, it was said, seemed to be the opinion of Lord Stair, Inst. p. 320.

The pursuer, likewise, pled a right by prescription to this patronage upon his possession. But that point did not receive any express judgment; the court being unanimously of opinion, that the titles produced were a sufficient legal conveyance of the patronage of this church to the pursuer's predecessors.

The Lords found, ' That the pursuer has an undoubted and exclusive right to the advocation, donation, and right of patronage and presentation of ministers to the said kirk and parish of Coldstream.'

Aft. Hely Campbell. Alt. Lord Advocate, Sol. General, Sol. of Tithes.

No. XXVI.

July 2. 1778.

Sir LAURENCE DUNDAS,

Against

*ARTHUR NICOLSON, and others.**The superior not liable to be assessed for the expence of building the manse.*

THE presbytery of Lerwick in Zetland assessed the parish of Nesting for rebuilding the manse, and proportioned the assessment among the heritors according to their number of merk-lands.

Messrs Nicolson and Hunter, who held their lands in the parish feu of Sir Laurence Dundas, for payment of a considerable feu-duty, having objected to this assessment, by which no part of the expence was laid on the superior, brought a suspension of the presbytery's judgment, and called Sir Laurence in an action of declarator.

Pleaded for the pursuers: 1mo, In the general case, the superior is bound to contribute to the expence of supporting the manse. By the stat. 1663, c. 21. renewing an act in 1649, the heritors of the parish are subjected to this burden. The term heritor applies to every person who has a feudal right in lands, superior as well as vassal. By heritor is understood superior in the acts 1661, c. 35. and 1691, c. 21.

This interpretation is agreeable to justice. The expence of kirks and manses is a public tax on the landed property, for the necessary purpose of supporting a religious establishment. It is equitable that both superior and vassal should contribute to this purpose in proportion to their respective interests in the lands; the superior for his feu-duties, and the vassal for his rent, deducing the feu-duties, unless it is otherwise stipulated betwixt them.

The general practice of assessing for parochial burdens by the valuation-book, interprets the statute in this manner. Though in Zetland there is no valuation of the lands, the same principle must regulate the assessment.

2do, The feu-duties stipulated in the feu-rights of the pursuers, are very nearly equal to every thing the tenants paid for them at the time. The superior having thus the substantial benefit from the lands, has continued ever since to pay the whole cess. If there had been a valuation in Zetland, the superior, as he paid the cess for the lands, would have at least stood valued for these feu-duties, and would have been assessed for parochial burdens, according to his valuation. But further, the whole of these parochial burdens have likewise been paid by

by the superior. This implies that it had been understood betwixt the parties, when these feus were constituted, that the superior should remain liable for the whole of these burdens.

Answered for the defender, to the first plea : By heritors in the act 1663, must be understood holders of land in property. So the word is explained by Sir George Mackenzie, in *Observ. on act 1662, c. 6.* And there was no reason that the expence of these parochial burdens should by the act have been made to reach the superior, who has no interest in the purposes for which they are imposed. He is not entitled as superior to a residence in the lands, nor even to a seat in the church. The heritor has the whole benefit of the parish-church ; and therefore ought to be subjected to the whole expence of upholding church and manse.

It is not required by the statute 1663, that the cess-roll should be the rule of assessment for these parochial burdens.—As it will answer, in most cases, to point out who are liable, it may, in general, be safely followed. But if, in any case, it should not correspond with the intendment of the statute, a different rule must take place.

To the 2d plea : Payment of the cess does not imply being liable in the parochial burdens. As to the parochial burdens, the practice in Zetland cannot be traced further back than 1731, and is not uniform.

The court, before advising the cause, ordained an inquiry to be made by the parties, Whether, in the general practice over Scotland, the superior was subjected in payment of any part of parochial burdens.—The court, upon advising certificates of the practice, with informations, were of opinion, that the expence of building the manse is to be laid on the property, and not on the superiority ; and that, by heritors in the statute 1663, proprietors are to be understood : That there has been no usage, either in the general case over Scotland, or in Zetland, sufficient to establish any contrary rule of assessment ; and found, ‘ That Sir Laurence Dundas cannot be assessed in any proportion for building the manse, on account of lands of which he is only superior.’

In a reclaiming petition for the pursuers, it was urged, that, although the superior was not liable in parochial burdens, the effect of this exemption must fall on the heritors at large. The vassal is only liable, along with them, in proportion to his interest, that is, his rent, deducting the feu-duty. In that manner, he would have stood valued, and been assessed, for these parochial burdens, in any other county where the superior paid no part of them, and the defender’s vassals in Orkney are so valued and assessed for these burdens.

The court refused the petition without answers.

Adv. Rae, Croftie.

Adv. Lord Advocate, Blair.

No.

No. XXVII.

July 3. 1778.

JAMES SELLARS,

Against

NINIAN ANDERSON.

Lawburrows.

JAMES SELLARS and his brother and sister were all apprehended on letters of lawburrows, obtained from the sheriff, by Ninian Anderson, and were liberated soon after, on finding the usual caution. They afterwards brought an action of damages against Anderson, on this ground, that the application for the lawburrows was calumnious and without cause.

In this action, the pursuers insisted, that the defender should specially condescend on, and prove the grounds and causes of his dreading harm. The defender gave in a condescendence; but, at the same time, contended, that he was not obliged to assign any causes why he dreaded the harm mentioned in his oath, still less to establish them by proof.

Pleaded for the pursuers: The manner in which lawburrows are obtained, without citation of the accused, or inquiry into the causes of the application, gives room to the committing of much injustice.—From the nature of this proceeding, there is no check on a groundless application, nor any means of avoiding the oppressive consequence of imprisonment till caution is found. The laws of other countries are attentive to prevent this injury. Those of England, in granting surety of the peace, require a citation of the party, and an oath specifying sufficient causes of dreading harm; Blackstone, B. 4. c. 18. In other nations, precautions of a like nature are required; *Christen. Comment. in leg. Mecklen. t. 4. art. 5.* Antiently in Scotland, though citation was not necessary, it would seem that the complainer was bound to prove some cause of his fear, by his oath or otherwise; A. 1429, c. 129. Stair B. 4. t. 48.

But although, in practice now, the complainer is not obliged to specify the causes of his fear, or prove them when the application is made; yet both ought to be required of him, when called in an action for a groundless application. It is impossible for the pursuer to prove the negative, that the defender had no cause to fear, except by proving that such as he shall specify are without foundation. If, therefore, he is not obliged to condescend, all evidence that the application was groundless is necessarily shut out.

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This cannot be the meaning of the law, which allows this diligence to be granted in a summary manner, but does not therefore authorise wanton and groundless applications. In the present action, the defender must assign and prove a rational cause of fear, otherwise damages must be given according to the established rule, that a person injured is entitled to reparation of what he suffers from the rashness and folly of another, as well as from bad design. In the similar case of an application on a *meditatio fugæ*, the creditor may be afterwards called on to support his oath, and must prove sufficient reasons to justify his application, otherwise he will be liable in damages; Ersk. B. 1. t. 2. c. 21.

Answered for the defender: The law of Scotland requires nothing more to entitle any person to letters of lawburrows, but that he is in dread of harm; A. 1449, c. 13. They are given to quiet the minds of those under such apprehensions; and the only effect of them is to oblige the person against whom they are directed, to find caution not to injure the obtainer of the letters, which, at any rate, the law would restrain him from doing.

As the dread of harm is entirely a matter of feeling in a person's own mind, it is capable of no proof but by the oath of the person himself. When he depones that he is under such dread, he has proved all that the law judges to be necessary for justifying his application; and, consequently, though it were true that the fear he depones to did not proceed from a sufficient cause, he is not liable afterwards in damages on that account. He is not, therefore, in defence against an action of this kind, obliged to specify, or prove the causes of his fear.

The principle on which lawburrows are granted, does not apply to the case of a *meditatio fugæ*. The effect of the caution likewise required in that case, is to restrain the debtor from what he would be otherwise entitled to do.

The court were of opinion, That the oath required by the judge, from the person applying for lawburrows, being only that he is under dread of harm, no action of damages lies merely on account of his not having a good cause for his fear. Malice, or any undue motive in making the application, are relevant grounds for an action of damages. The judgment was, 'Finding that the petitioner, after application for letters of lawburrows, and his oath taken, is not bound further to justify the facts upon which his application proceeded.'

A.A. Cullen.

Alt. Craig.

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No.

No. XXVIII.

July 7. 1778.

CREDITORS of the YORK-BUILDING COMPANY,

Against

JAMES FORDYCE, and others.

Effect of a process of sale, and petition to sequester as to the debtor's powers of administration over the subject.

THE York-building Company, in 1719, purchased from the crown several forfeited estates in Scotland.—In 1721, their commissioners granted a lease of the lands of Belhelvie, part of these estates, to George Fordyce, his heirs, &c. at the rent of L. 500, for 15 years, which lease was prorogated for other 14 years from its expiry.

Soon after the purchase of the forfeited estates, the affairs of the company went into disorder. In 1720, an act passed, enabling them to raise money, by a lottery of annuities, out of these estates; and, for the security of the annuitants, the company granted a trust-deed, empowering the trustees, in case of the non-payment of the annuities, to enter into possession of the lands. They borrowed, afterwards, another large sum upon an heritable security over these estates, which were likewise adjudged by the Duke of Norfolk, and partners, creditors of the company, to a great amount, and by other creditors.—Upon some of the adjudications charter and feifine followed.

In 1732, the company having failed in payment of their annuities, the annuitants raised an action of mails and duties against the tenants of their lands, upon which the tenants having brought a multiple-poining, it was ultimately found, that the annuitants were preferable, *primo loco*, on the rents, and, after them, the Duke of Norfolk, and partners.

In 1735, the annuitants raised a process of ranking and sale of these estates. This action was depending in 1744, when the Duke of Norfolk, and partners, applied, by petition, to the court for a sequestration; setting forth, that the company, as proprietors, were giving leases of the lands, and some of them at an under rent. The petition, after being duly intimated, was remitted by the court to an Ordinary, to enquire into the facts.—Upon his report, it was again remitted, to inquire into the arrears due the annuitants; and, in the mean time, the court prohibited the company to set any tacks of their estates without the authority of the court.

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During the interval betwixt presenting the petition in December 1744, and the prohibition of the 14th June 1745, the company granted leases of their lands for long terms of years; and, among others, prorogated the lease of Belhelvie, in favour of David Fordyce, for 37 years after expiry of the current lease: The rent to be augmented to L. 525 after the year 1750. Fordyce, and his assignees, continued in possession from 1745 to the present time, paying the rent to the annuitants.

In 1753, some preferable debts were cleared off by a partial sale of the estates.—In 1776, the greater part of the annuities being extinguished, an act of parliament was obtained by the postponed creditors for a total sale of these estates. They were afterwards sequestrated and a factor named, with power to bring reductions of the leases granted by the company since 1732.—An action of reduction was accordingly brought; among others, for setting aside the lease of Belhelvie to Fordyce in 1745, against James Fordyce, and others, assignees of David.—In this action, the creditors insisted for removal of the principal tacksmen, but not for any higher rent, as to bygone years, than that contained in the tack; and agreed, that the sub-leases should remain for their term of endurance.

Pleaded for the pursuer: The company had not power to grant the lease in question: They were insolvent at the time: The annuitants drawing the rents: The lands adjudged: A process of sale, and a petition to sequester, in court. In that situation, though the judgment to sequester had not yet been pronounced, the unlimited administration of these estates no longer remained with the company: The creditors had the only substantial interest in the lands. It was *ultra vires* of the company to do any thing in the management to the prejudice of the creditors; or exercise any act of administration over the subject, but what was strictly necessary to preserve the subject for them. The lease in question was unnecessary, for there was a current lease on the lands of Belhelvie at the time.—It was to the prejudice of the creditors; for the locking up the lands by a lease of so long endurance, was obviously a bar to the sale of the subject, in which the creditors were insisting.

As the granting this lease, therefore, was *ultra vires* of the company, it would not avail the defenders though they could plead *bona fides*, and ignorance of the state of the company, on the part of the lessee. This could go no further than to save from bygones: But the lessee was not in *bona fide*. The situation of the company was publickly known; and the lessee, who was paying his rents to the annuitants, could not be ignorant of it.

The time at which the lease was obtained, while an application to have the company prohibited from granting such lease was depending, is evidence of the *mala fides* of both parties, and of its being a collusive transaction.

The pursuers cannot be deprived of the right to challenge this lease on account of a taciturnity less than the years of prescription. They had no interest in bringing the challenge until the act of parliament,
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and the sequestration in 1777, which paved the way for the payment of their debts out of these estates.

Answered for the defenders: The company remained in the administration of these estates at the date of this lease: They had not been deprived of it by the trust-deeds, nor any diligence then done by their creditors. Their creditors might have been entitled to take the management from the company at this time; but, until they were actually removed by a judgment of the court, third parties, who saw them in possession, must be safe in transacting with the company. The lease in question was only an act of ordinary administration.

As to the charge of collusion, whatever suspicions may arise against the company from their situation at the time, the lessee was acting *bona fide*. There is no evidence of his being in the knowledge of their situation.

The long taciturnity is evidence that all parties concerned were satisfied with the lease.

Besides the grounds of reduction above mentioned, it was likewise urged by the pursuer, that the lands were let at an under rent, but the court considered the rent as adequate for the lands when the lease was granted.

The court were of opinion, That, in the circumstances of the company at the time, they had no power to grant the lease in question, and that the long endurance of the lease is sufficient objection to it, though the rent might be adequate.

Observed on the bench, That, after a process of sale is brought, the debtor, even before a petition for sequestration, cannot grant leases for any length of time, for such leases must have a bad effect on the sale. And it was said, that the edictal citation is sufficient intimation to all and sundry of the debtor's situation.

The court 'sustained the reasons of reduction of the lease of the 'lands of Belhelvie;' and adhered to their interlocutor upon advising a petition and answers.

Act. Lord Advocate, Ilay Campbell, Buchan-Hepburn. Alt. Solicitor General, Ras, Crossie.

No. XXIX.

July 7. 1778.

CREDITORS of the YORK-BUILDING COMPANY

Against

DOCTOR STEWART THREEPLAND.

THIS case differed from the preceding only in the two following particulars: *1mo*, The lease to Doctor Threepland was granted for the space of 99 years: *2do*, The old lease upon the lands was expired at the time that the new lease to the defender was granted. *3tio*, The parties had treated about the lease before the petition to sequestrate.

The court pronounced a judgment similar to that in the former case.

A. A. Advocate, Ilay Campbell, Buchan-Hepburn. Alt. Solicitor General, Rae, Crosbie.

No. XXX.

July 8. 1778.

CREDITORS of PATRICK M'DOWAL,

Against

CHARLES M'DOWAL.

Powers of a judicial factor.

CHARLES M'DOWAL brought an action of declarator, valuation, and ranking, against the creditors of his deceased father, Patrick M'Dowal of Crichan, as heir served, *cum beneficio inventarii*, to his father; and obtained a judgment, finding that he was entitled to hold his father's real estate at a proven value.—Afterwards, in the course of the ranking, on the application of the creditors, a factor was named by the court, to whom Charles M'Dowal was ordained to pay over the proven value of the lands.

This factor having died, a petition was given into court in the name of Charles M'Dowal, and a part of the creditors, for having a new factor appointed; in which they set forth, that it would be expedient to vest the new factor with powers to enter into submissions, on behalf of the creditors, with the said Charles M'Dowal, and others they may have claims against. The prayer of the petition was to nominate

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Alexander

Alexander Orr factor, ' with power to submit, as to him shall appear ' most eligible, for the interest of the creditors.' The petition was intimated to certain persons, as doers for the other creditors.—On the 5th March 1759, it was remitted by the court to an Ordinary, to hear parties procurators, and report; who, on the 8th March, reported, ' That, having heard parties procurators, they consented that Mr Orr ' be appointed factor, with the powers, as craved in the prayer of the ' petition.'—On which the court nominated Mr Orr to be factor, ' for ' the purposes mentioned in the prayer of the petition, with the usual ' powers.' A submission was entered into betwixt Mr Orr and Charles M'Dowal, for settling the claims which the creditors and he had against each other; and a decreet-arbitral was pronounced.

Upon the death of Orr, a new factor being appointed, an action was brought at the instance of the creditors, and their factor, for setting aside this decreet-arbitral.

Pleaded for the pursuers: Orr had no sufficient powers to enter into this submission on behalf of the creditors. He had nothing more than the ' usual powers' of a judicial factor conferred on him: Under these, that of referring to arbiters the rights of parties is not included: Neither could this power have been conferred on him by the mere authority of the court in the act of factory. The interposition of the court can go no further than to the preserving of the subject, and its rents, and interests, for behoof of those concerned. To this extent the court are supported, on grounds of equity, in assuming the powers of a proprietor, and vesting them in their factor; but they cannot go the length to exercise the more eminent rights of property over the subject; such as the compounding of claims, or referring the rights of parties to arbiters. Parties themselves cannot be obliged by a court to enter into a submission of claims brought before it for decision: *A fortiori*, the court has no power to appoint a factor to enter into such a submission in the name of the parties.

Answered for the defenders: A judicial factor, appointed with nothing more than the usual powers, is understood to be possessed of considerable discretionary powers in the management of the subjects.—In case of disputed claims, he may choose whether to bring his action in the supreme or inferior court.—He may rest satisfied, if he thinks proper, with the judgment of the inferior court, though given against him. If this sort of discretion is vested in the factor, there seems to be no reason why he should not exercise it in another form, by submitting the claim to an arbiter, in place of bringing it into a court of law. Instances (it was said) have occurred, where the judicial factor has exercised this power of submitting claims, and it never was challenged in any case until the present.

But, at any rate, the court, on the same principles of equity which lead them to assume the administration of the subject in other respects, may confer a special power to enter into submissions on their factor, when they judge that measure to be expedient. This power was specially conferred in the present case by the court. The words *usual powers*, adjoined to the act of factory, do not take away the power to submit

submit claims, which is one of the purposes mentioned in the prayer of the petition.

All the creditors must be considered as concurring in the petition for naming the factor with this power, either by joining in it as petitioners, or by having it intimated to their agents, and consenting to it by their lawyers, when remitted to the Lord Ordinary.

The case of Brown *contra* Scougal, 17th June 1758, was founded on, as establishing that a factor, *loco tutoris*, has a power to submit, when appointed only with the usual powers.

Replied for the pursuers : Nothing could authorise a submission of this kind, but an express authority, or mandate, to the factor, under the hands of the creditors themselves.—The process of ranking was sleeping at the time the petition was given in.—No authority is produced from the creditors whose names are assumed to the petition ; and the loose and hurried proceedings before the Lord Ordinary can infer no consent on the part of the other creditors.

The office of a factor, *loco tutoris*, is very different from that of a judicial factor on a sequestrated subject ; and, from the nature of it, requires more extensive powers.—But there is no reason for supposing, that even his powers extend to the submitting of claims.—In the case of Brown *contra* Scougal, the decret-arbitral was acquiesced in by the minor and his friends ; and the challenge was brought by the party who contracted with the factor ; against whom it was pled, that he was barred *personali exceptione*.

Besides the defences above mentioned, the defender founded on some transactions after the decret-arbitral, as implying an homologation of it by the creditors.

The court were of opinion, That, under the usual powers of a judicial factor on a subject, that of referring claims is not included : And it was said by several of the judges, that the court could not grant such a power on the application and consent of only part of the creditors :—That, even though there were an application from the whole creditors, it was not the province of the court to grant such a power.

The judgment was, ‘ finding that the factor had no legal or sufficient powers to enter into the submission on which the decret-arbitral proceeded ; and that the same were not sufficiently homologated by the creditors, so as to supply said original defect ; therefore reduce,’ &c.

A&A. D. Rat, Ch. Hay.

Alt. Crobie.

No.

No. XXXI.

July 11. 1778.

PATRICK REID,

Against

MATTHEW DONALDSON.

Beneficium competentiae.

PATRICK REID obtained decret of *cessio bonorum* against his creditors. Afterwards, Donaldson, one of the creditors called in the *cessio*, pursued Reid for payment of his debt, obtained decret in absence, and was proceeding to do diligence against his effects.—In a suspension,

Pleaded for Reid: The decret of *cessio* protects the suspender not only from personal diligence, but likewise from diligence against his effects afterwards acquired; except in so far as the charger is able to instruct, that the suspender has effects over and above a competency for the subsistence of him and his family. This is agreeable to the doctrine of the Roman law, from which we borrow the action of *cessio*, and the *beneficium competentiae* given by that law to the obtainer of the *cessio*, ff. l. 42. 3. 6. is likewise adopted into ours, *Quon. Attach. c. 7.*; Bankton, v. 3. p. 18. § 1. p. 19. § 5.; Erskine, p. 696. § 27. The charger, therefore, can attach no effects belonging to the suspender, without first condescending on such effects, that it may be known whether a competency would remain.

On the part of the charger: No objection was made in this case to suspending, as to diligence against the person of the bankrupt; but, it was insisted, that the decret of *cessio* does not protect effects of the bankrupt, afterwards acquired, from the diligence of his creditors. Our law does not indulge the bankrupt with a reservation of effects sufficient for an aliment. The opinions of Lord Bankton and Mr Erskine, adduced by the suspender, seem to be founded solely on a passage in the *Quon. Attach. c. 7.* which supposes that every debtor, both before and after a *cessio*, is entitled to this privilege. That passage, therefore, can merit no regard as an authority. The law is fixed by the usage. No instance ever occurred in which this reservation was allowed, either at obtaining the *cessio*, or out of effects afterwards acquired. The charger, therefore, is not bound to condescend, as the suspender is not entitled to have any thing reserved.—Such a condescendence might likewise be the means of disappointing the diligence altogether.

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The court were of opinion, That the charger must be allowed to proceed in his diligence to attach the effects, without condescending, and that the debtor had no right to have any part of his effects set aside to him for his maintenance; but in case the charger, in the execution of the diligence, should proceed to any act of rigour, such as attaching the tools by which the suspender, as an artificer, gains his daily bread, the court would then judge on the circumstances of the case, whether the diligence ought to be supported.

‘ The Court suspended the letters *quoad* personal diligence against the suspender; but, in other respects, found the letters orderly proceeded.’

No. XXXII.

July 14. 1778.

ALEXANDER MAIR,

Against

JAMES SHAND.

Competency of the Court to an action on a battery, ad civilem effectum, in the first instance.

MAIR brought an action against Shand for a battery on his person, concluding for damages, and L. 50 as a *solatium* for wounds and bruises he had sustained.

Shand objected to the competency of the court.—When the sheriff, who has a proper criminal jurisdiction in riots and batteries, awards only a fine, the court may review the sentence, because the matter then becomes properly civil.—But the court have no jurisdiction to try these delicts in the first instance; Ersk. B. 1. t. 3. § 21.; *Alvis contra Maxwell*, 4th March 1707, Fountainhall.

The present action is not merely *rei persecutoria*, for the expence of curing wounds. A large sum, *in solatium*, is demanded. The court, therefore, is required to inflict a penalty on account of a crime.

Answered for the pursuers: The court is competent to every action brought *ad civilem effectum*, though founded on facts of a criminal nature, as in assythment for murder, reparation of damages done by theft, robbery, and damages by a battery, as well as any other injury.

The authorities founded on apply only to the case where the action is brought *ad vindictam publicam*, and for punishment; but the competency

petency of the court to an action *ad civilem effectum*, is laid down by Ersk. B. 1. t. 3.; and Bankton, B. 4. l. 7. p. 29.

The conclusion for a *solatium* is entirely of a civil nature, being only in reparation of the injury to the private party.

The court ‘ found the action competent before this court.’

Act. Erskine.

Alt. Hay.

No. XXXIII.

July 22. 1778.

Sir JAMES GRANT, and others,

Against

The DUKE of GORDON.

Powers of the crown in granting a right of cruive-fishing.

AT an early period, general rights of salmon-fishing in every part of the river Spey, had been granted by the crown to the different proprietors of the adjacent grounds.

In 1684, long subsequent to these grants, the Marquis of Huntly, in a charter of resignation from the crown, obtained a clause of *novodamus*, proceeding on a sign-manual, which gives him a right to the use of cruives on the river, within certain bounds, where he formerly had a general right of fishing, and where the Earl of Fife’s authors had a right of curroch-fishing.

The attempts of the Duke of Gordon to erect dikes across the river, in this part of it, produced one process in 1727 against him, and another in 1733. Afterwards the Duke erected a cruive-dike in the same place, which gave rise to a new process at the instance of the Earl of Fife, and, likewise, of many of the upper heritors, concluding, in substance, to have it found, that the Duke had no title to erect cruives to the prejudice of their fishings. A final interlocutor was pronounced in this process, 10th August 1775, finding, ‘ that the Duke ‘ was not entitled to have cruives, dikes, or braes, upon that part of ‘ the river of Spey, within which the crown had granted rights of ‘ fishing to other heritors before the date of the Duke’s charter; and ‘ therefore ordain these cruives, &c. to be demolished.’

Upon an appeal taken by the Duke, the house of Lords reversed this judgment, and remitted the cause to the court, to proceed on the foundation of the respective rights of the parties, established by an interlocutor in the former process, 14th July 1727.

Parties

Parties having differed as to the application of this judgment, the court found, ' that Earl Fife's right of fishing with currochs only, ' was no bar to the crown's granting to the Duke of Gordon a right ' of cruive-fishing within the bounds, reserving to all parties any other ' grounds of challenge against the Duke of Gordon's right to cruives.'

After this judgment, the upper heritors resumed the challenge of the cruives at their instance.

Pleaded for the upper heritors: The crown having previously conveyed the total and complete right of the fishings in every part of this river by grants to the predecessors of the pursuers, and others, *salmonum piscariæ*, nothing remained with the crown to be the subject of an after grant.—It is true, that, under a general right of fishing, the grantee is not entitled to the use of cruives in the place where the fishing is given. The law considered that species of fishing as a pernicious device, which ought to be discouraged. But the right to cruives, though it is denied or not given by the grant of general fishing, is not reserved to the crown as a separate subject, which the crown could bestow on another. The crown is totally divested of the fishings of the river by these grants over every part of it; and the law understands no implied reservation, by which a new grant may be made to the prejudice of fishings already established in others.

The defender's grant to cruives, therefore, in the 1684, was *ultra vires* of the crown. A right of cruive-fishing in the lower part of a river, annihilates the fishings on the higher part of it, and is not less prejudicial to the general right of fishing belonging to the superior heritor, than if the right to cruives were given within the bounds of his own grant.

A contrary doctrine was represented as alarming to the rights of an extensive subject of property. The Salmon-fishings in Scotland are universally considered to be as secure to the proprietor as a land-estate and are daily sold at a price adequate to their present produce. But this property must at once be reduced to a precarious possession, at the pleasure of the crown, if a right to cruives may be granted to an inferior heritor.

The pursuers likewise laid some stress on the act 1581, c. 111. as pointing at a prohibition against granting a right to cruives thereafter, and at least proving that the law considered such grants as unfavourable.

Pleaded separatim for Lord Fife: Though the defender should be found entitled to fish by cruives, it must be in a manner consistent with Lord Fife's curroch-fishing within the same bounds, which being previously granted, could not be taken away by the grant of cruives. The defender, therefore, must leave an opening in his cruive-dike for the passage of the pursuer's currochs.

Answered for the defenders: The question whether the crown can give a right of cruives to one person, in the same place where a general right of fishing had been previously granted to another, is not before the court. But it has been already found, in the case of Lord Fife,

Fife, that a partial right of fishing does not bar a grant of cruives to another in the same place. The upper heritors have still less title to challenge this grant than Lord Fife. They have no right of fishing whatever, in the place where it is given.

It is not enough to say, that, in consequence of the cruive-dike, the produce of their fishings is diminished. That must be the consequence where the crown grants any kind of salmon-fishing on the inferior part of the river, after a grant of fishing on the superior part. Every original grantee or purchaser of a fishing, is presumed to know the quality which necessarily attends it: That, notwithstanding of his grant, the crown is entitled, in all the other parts of the river, to give a right to every kind of salmon-fishing, and to that of cruive-fishing as much as any other.

It is of no consequence that these general rights of fishing were given over the whole river before a right to cruives was given. The crown may extend the right of any of these heritors to a cruive-fishing by a special grant, for the same reason, that an inferior heritor having only a right of curroch-fishing may have this right extended by the crown to a coble or general fishing.—On all rivers where cruives are now established, there were undoubtedly grants of fishings in the superior part of the river before the grant of cruives in the inferior part.

2do, To Lord Fife's plea: The defender being found entitled to a cruives, cannot be obliged to make an opening in his dike for the passage of currochs. It would no longer answer the purpose of a cruive-dike, as all the salmon would escape by this passage.

Besides these general points of law argued in this case, the pursuers founded on the words of a contract in 1724, as barring the Duke from erecting cruives. But the court were of opinion, that the contract could not bear this construction, and was likewise derelinquished.—The defenders founded on certain interlocutors in the process 1733, as decisive of the question against the upper heritors. But, as there were some of the upper heritors parties to the present process, who were not parties to either of the former actions, the court thought the question still open to be tried at their instance.

The court ‘repelled the objections to the Duke of Gordon’s right
‘to cruive-fishing *sub saxo de Ardquish*, established by the charter 1684, as well the objections founded on the act 1581, as
‘those founded on the interest of the superior heritors, or on the
‘interest of the Earl of Fife, and, in these terms, repel the reasons
‘of reduction.’

A&. Lord Advocate, Ilay Campbell, Elphinston, J. Grant.
Alex. Gordon jun.

Alt. Sol. General, Rae, M^r. Laurin,

No. XXXIV.

July 24. 1778.

DOUGLAS, HERON, and CO.

Against

ALEXANDER HAIR.

Powers of a company to call from the partners for a contribution beyond the capital subscribed.

AT a general meeting of the partners of Douglas, Heron, and Co. in August 1773, it was resolved, ' That, from and after that date, the Company shall give over the business of banking in all its branches ;' and a committee was appointed for winding up their affairs, with ample powers.

At subsequent general meetings in July and August 1776, it appearing that the Company had then incurred a loss of L. 70,000 certain, over and above their subscribed capital, it was resolved that every partner should be immediately required to pay up his whole capital, and to advance a further sum of L. 200 upon each share of L. 500. Those who did not comply to be prosecuted.

Actions were accordingly brought in the name of the Company against many different partners who did not object to the paying up of the capital, but refused the call for the L. 200 ; among others, against Alexander Hair and his trustees, in whom his estate was then vested.

Pleaded in defence : imo, That the meeting had no right to compel a contribution of this kind.

By the 19th article of the copartnership it is declared, ' That nothing herein contained shall be understood to import a power in any general meeting whatever to compel any partner to pay or contribute any thing more to the company-stock than the precise sum by him originally subscribed for.' The majority of a meeting, therefore, could not have assumed this power, even when the Company subsisted.—But, though it had been competent then, it is not so now. The resolution of the general meeting August 1773, is to be considered as a dissolution of the Company ; for the Company was insolvent, and the whole business of it is thereby put an end to. That the debts of it are not paid, is no reason for considering it as undissolved. That might have been the case after the time of its endurance by the contract was expired. The dissolution of the Company is nevertheless complete, and the articles of their agreement, which

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vested

vested powers in the majority of their meetings over individuals, are at end. The partners remain liable for the debt; but no number of them can oblige any other partner to enter into joint measures for payment of the debts, still less can they levy money from him for that purpose.

When such powers are meant to be vested after a company have given up business, an express stipulation to that purpose is necessary in the copartnery agreement. The winding up of the company-affairs upon its dissolution, is the object of the 15th article. A method is therein laid down for levying the debts due to the Company, and turning their effects into cash, to be employed in the extinction of their debts. The pursuers did not follow out the directions of this article. The powers they now assume are authorised by no part of the original contract, nor of the minute dissolving the Company.

2do, Although the majority of the partners had power to make a call of this kind, when a pressing necessity required their taking such a measure, that is not the case at present; for the proper funds of the Company are more than sufficient to answer all demands now made by their creditors.

Answered for the Company: 1mo, The present case does not fall under the 19th article of the copartnery. The pursuers here are not calling for an addition to the Company's stock, which is at an end, but for money to answer pressing debts over and above every thing the stock can pay.

They have powers to call for such aid from the partners. The Company was not dissolved by the resolution August 1773. That resolution extended only to the giving up their banking business, on account of their insolvency as a Company; but in every other respect they continued connected by their contract of copartnery as before. They appointed a committee, with the powers of a general meeting, to wind up their affairs, and all their powers as a company remain with them in every stage of that business.

It would have been highly detrimental and ruinous to the interest of the Company to have followed out the plan of article 15th in the present emergency. The contract specifies the cases in which that method is to be pursued. But the situation in which the Company now is, falls under none of these cases, and could not enter into the minds of the partners at the time. Their conduct must be regulated by their circumstances.

2do, The measure taken is indispensibly necessary to extricate the Company from its difficulties.—A general state of their funds and debts was exhibited, to shew that there was no fund immediately tangible sufficient to answer the great demands that were running against the Company.

The court were of opinion, That the Company was not dissolved by the resolution August 1773, and that the propriety and necessity of the measure were sufficiently ascertained by the situation of their affairs. ' The court repelled the defences, and decreed for what remained unpaid of the capital, and L. 200 as the defender's proportion

‘ tion of his share of what is now requisite towards defraying and
‘ making good the losses of the Company.’

For the Pursuers, *Wight, Ilay Campbell, Advocate.* *Alt. Rae, Rolland.*

No. XXXV.

July 28. 1778.

JAMES CHALMERS,

Against

CHARLES NAPIER.

Detention of an apprentice to serve at sea by an impress officer.

ALEXANDER GREGORY, an indented apprentice to serve at sea, was, on 29th December 1777, pressed out of a boat in the Frith of Forth, and carried on board a tender in the Frith. James Chalmers, Gregory's master, applied next day to Captain Napier, regulating captain of the impress service, to obtain his release, offering to show him the indentures. Captain Napier, without looking at the indentures, refused positively to release the apprentice.

Mr Chalmers brought an action, by petition, in the court of admiralty, for liberation of the apprentice; and, in the mean time, prayed for an interdict to prohibit Captain Napier from carrying off the said apprentice. Captain Napier pleaded, in his answers, that Gregory, having no protection from the admiralty, had no title to be exempted from the press.

The judge-admiral pronounced this judgment, 5th January 1778: ‘ Stops all further proceedings in this cause, in order that, in the mean time, the petitioner may apply to the Lords commissioners of the admiralty for redress.’ Mr Chalmers presented a bill of advocation, and another of suspension; in both of which he craved an interdict to prohibit Captain Napier from sending the apprentice out of the country till the cause should be determined.—The bill of advocation was intimated on the 7th January.—The interdict craved in the bill of suspension was granted 10th January.—But the tender, with the apprentice on board, had sailed for a port in England on the preceding night. Mr Chalmers then brought an action of damages against Captain Napier.

Proceedings went on upon the bill of advocation, which was remitted to be advised by two Lords in the vacation; before whom Captain Napier was ordained to bring the person of Gregory upon the 15th April. The order was renewed to the 10th March, when Captain Napier produced a letter from the secretary of the admiralty, giving, as the reason why the orders of the court had not been complied with, that Gregory had been sent abroad in his Majesty's service before the Board had an opportunity of giving the necessary directions for having him conveyed to Edinburgh.

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The Lord Ordinary took the bill of advocation, and proceedings, to report ; and, at the same time, the merits of the action of damages came to be advised.

Before proceeding to the merits, the court determined two preliminary points : *imo*, Whether an advocation from the court of admiralty was competent in this case.

The defender insisted : That the question before the admiral was strictly maritime ; the cause of action having arisen at sea, and the seizing of Gregory, if illegal, being a maritime delict.

Answered for the pursuer : The fact on which the complaint proceeded is not of a maritime nature, being a violation of a common law indenture. It is therefore of no consequence that the apprentice was impressed at sea.—But the ground of complaint was strictly on shore. For the complaint is not, that the apprentice was illegally apprehended, but that he was illegally detained after an application to liberate him.—The admiral, by his judgment, waves his own jurisdiction, and sends the pursuer to the Lords of the admiralty, to whom he is not obliged to submit any rights which the law gives him.

The court were of opinion, That the admiral's jurisdiction was not privative in this case ; and, on that ground, advocated the cause. In general, the court thought, that the admiral ought to have proceeded, especially on what was relative to the interdict ; the object of which is disappointed in such a case, if the judge does not immediately take cognizance of the merits of the application for it.

2do, The court took into their consideration, Whether there was any contempt of authority in this case ? and, as no interdict was actually granted till after the apprentice was gone, the court found, ' That the defender had done nothing in contempt of the orders of the court ; and that, since the date of the order, he had done all that he could to bring back the person of the apprentice.'

On the merits of the cause itself, and the action of damages,

Pleaded for the pursuer : That he is entitled to his damages arising from the illegal detention of his apprentice. The illegality of this detention is founded on the terms of the statute, 23d G. II. c. 17. which enacts, ' That every person, who having not before used the sea, binds himself apprentice to serve at sea, shall be exempted from being impressed from the space of three years from the time of his binding himself apprentice.' The exception here given is clogged with no condition.

The subsequent clause is in these words : ' And for the better securing to all the persons before mentioned, the benefit intended them by this act, be it further enacted, that the Lord High Admiral, &c. shall, upon due proof of the respective ages, or circumstances, (as the case shall happen) of any of the persons above mentioned, grant a protection to any such person, to secure him from being impressed for such time as, by the true meaning and intent of the act, such person is to be exempted.'

Although by this clause of the act, the exempted persons are entitled to a protection, their right of exemption is not made dependent on their being possessed of such protection. It is not introduced as a condition

condition under which the exemption is given ; but for the better securing ' of these persons,' which supposes there was an exemption without it.

This apprentice, though he had no protection, fell within the description of an exempted person. The pursuer produced his indenture to Captain Napier, and in the process before the admiral.—In that process he likewise set forth, ' That Gregory was his apprentice, ' and that he was never at sea until after the date of his indenture.' The pursuer's averments, therefore, were, in both respects, precisely what the statute requires. Had he refused to establish these by proper evidence, or failed in it, the detention of the apprentice would have been legal.—But the defender did not put the cause of his detention on that issue. His plea was, that it was of no consequence whether he had the requisites to entitle him to a protection or not, as he was not possessed of it.—The detention, therefore, of the apprentice was illegal ; of consequence damages are due.

Answered for the defenders : The protection is to be considered as indispensably requisite to the exemption in the act 13th Geo. II. It is expressly given to ' secure the exempted person' from being impressed.

The interpretation of the act, which the pursuer contends for, would defeat the essential purpose of the impress service, which, if it is not executed with dispatch, ceases to answer its end. If the person entitled to the exemption has been so supinely negligent as not to get a protection, the impress service cannot be delayed by entering into processes and disputes, whether he had a title to get it or not.

Even supposing that a protection was not necessary, no action can lie for detention of this apprentice. For, although Mr Chalmers showed the indenture to the defender, he did not bring evidence of the apprentice not being formerly at sea, which is a necessary requisite, as much as the indenture, to the exemption.

The defender likewise pleaded an objection to the pursuer's title, that, from the terms of these statutes, it was not the meaning of the legislature to give the benefit of them to any person but the apprentice himself.

In consequence of an order on the parties, an inquiry was made into the practice in England among the impress officers. Upon advising the cause, *the court were of opinion*, that the pursuer having right to the service of the apprentice by the indenture, had a sufficient title to carry on this action. The court gave no decisive judgment on the interpretation of the statute 13th Geo. II. Whether a protection is, or is not, a condition under which the exemption is given, and indispensably requisite to give a right to the exemption ? But they seemed to be of opinion, that, at any rate, if there was not a protection, evidence must be expressly, and immediately, offered, not only of the apprenticeship by the indenture, but, likewise, of the apprentice not having been at sea before the date of the indenture ; and that the pursuer had failed in this particular.—The judgment was, ' find the defender not ' liable in damages to the pursuer.'

No. XXXVI.

July 28. 1778.

A L E X A N D E R S P I E R S, and others,

Against

*T H O M A S D U N L O P, and others.**Powers of the father over a subject provided to the heirs of the marriage.*

BY contract of marriage betwixt James Dunlop and Henrietta Maxwell, his estate of Garnkirk was settled on himself, and his wife, in conjunct-fee and liferent, and the heirs-male of the marriage.

James Dunlop, heir-male of the marriage, having engaged in an extensive trade, borrowed considerable sums, for which his father became jointly bound with him. The son failed, and disposed his effects to Spiers, and others, as trustees for his creditors. The debts in which father and son had been jointly bound, were paid up by Thomas Dunlop and others; and, for their security, the father granted an heritable bond over his estate; and, afterwards, a trust-disposition, empowering them to sell his estate, to apply the price to the payment of his debts, and the reversion to be paid to himself, his heirs, and assignees.—He likewise executed, soon after, bonds of provision in favour of his own youngest children, and a bond for a sum, payable at the first term after his decease, to his son James, and his wife, in liferent, and their children in fee, and another sum to James, in liferent and the children in fee, with this *proviso*, ‘ that the liferent to James should be held to be alimentary, and should not be subject to his debts, or capable of being alienated by him.’ He likewise, by a new deed, enabled the trustees, formerly named, to apply the price of the lands, after paying the debt, to the payment of these provisions. And as to the residue, if any, the trustees were thereby empowered to convey it to his son simply, or under such reservations as they, at the time, should think proper.

James Dunlop, elder, died soon after; and the trustees of his son’s creditors having, upon a charge against him to enter heir, adjudged the estates provided to him in the contract of marriage, brought a reduction of the whole deeds above mentioned, granted by the father, in which his trustees, and all parties concerned were called.

Pleaded for the pursuers: It is an established point, that, by providing the estate to the heir-male of a marriage in the contract, a right of succession is vested in the heir, which cannot be defeated or restricted afterwards, by any gratuitous deed of the father. Garnkirk, therefore, had not power to defeat his son’s right to the full benefit of the succession,

succession, by confining him to a liferent, and giving the fee to his children. The heir was entitled to set aside such deeds.

The insolvency of the heir no more deprives him of this *jus crediti* under the marriage-contract, than it annuls his right as creditor under any bond or obligation. On the contrary, the circumstance that the creditors of the heir have an interest, is an additional reason that the succession should not be disappointed, or the benefit of it diminished. Money is often lent on the faith of such successions. When they open to the heir, the creditors, by attaching them, have the same right which the heir had to render them effectual.

It was admitted by the pursuer, that the provisions of Dunlop, elder, to his younger children, could only be challenged in so far as exorbitant, as they are only in so far gratuitous.

Answered for the defenders: The heir of a marriage has not an absolute right to the succession. It may be disappointed by all onerous deeds of the father, and lessened by provisions to his children. The father, who remains heir, may likewise, on reasonable considerations, lay the heir of the marriage under restrictions, in order to save the estate from being carried off by creditors, where the heir is a spendthrift, or bankrupt; Thomson and his creditors, *contra* Thomson, 1762. Vide note on Ersk. p. 562. On this principle, the deed executed by Garnkirk, limiting his son's right in the reversion of the estate to an aliment, proceeded. It is not an act in fraud of the provision in the contract, but to prevent that provision from being frustrated, as far as circumstances will admit.

There is no injustice done to the creditors. In lending their money, they could have no dependence on so precarious a right of succession.

The court were of opinion, That the object of the deeds under challenge being gratuitously to defeat the right of property, to which the heir is entitled upon his succession, they are not effectual against the heir, nor his creditors, who are entitled to have the whole benefit of the succession applied to their payment. The court found, ' That James Dunlop, elder, could not disappoint the succession of the estate of Garnkirk, as settled upon the heir-male of the marriage between him and Henrietta Maxwell, by their marriage-contract; and in so far sustains the reasons of reduction: And remitted to the Lord Ordinary to proceed accordingly.'

A.A. Wight, Blair, Craig.

Alt. Hay Campbell, Morthland.

No. XXXVII.

July 28. 1778.

MASTER-TAYLORS of Edinburgh,

Against

*The JOURNEYMEN-TAYLORS.**Power of the Justices of peace to fix the wages of craftsmen.*

THE justices of peace of Mid-Lothian, upon an application from the master-tailors of Edinburgh, enacted regulations, by which the houses of call for journeymen out of employment were put under certain restrictions; and every such journeyman was obliged to work with any master who should offer to employ him, at one shilling a day of wages. Master-tailors were likewise prohibited from giving more wages under a penalty.

The journeymen being discontented with these regulations, brought them under review by a suspension, as impolitic in themselves, and as *ultra vires* of the justices.

Pleaded for the master-tailors: The justices of peace are ordained by the act 1617, c. 18. 'to set a price on craftsmens' work.' And, by act 1661, c. 38. 'to appoint prices for all handicrafts,' &c. Under these expressions in the two statutes, the justices have power to regulate wages of journeymen in every trade. By price, *wages* are understood, and the handicraft is the person who works at the trade.

Though the words of the statutes were to be explained as ordaining them to fix the price of made work, the power of rating the wages of workmen must be considered as implied and included under it.

The Scots justices of the peace have the powers of the English, in matters of police, conferred on them, (stat. 6to An.) who are entitled to regulate the wages of journeymen, act 5. Eliz. c. 4. § 15. and 1st Ja. c. 6. The practice, accordingly, is, that magistrates, as justices of peace within their boroughs, are in use to regulate the wages of journeymen.

2do, The regulations are proper. It is necessary to fix the *maximum* of wages, in order to prevent imposition, and the effects of combination among journeymen to raise their wages. At the same time, the more expert tradesmen will not suffer, as they can always by piece-work earn wages according to their merit. The other regulations were necessary for the execution of those relative to the wages.

The chargers likewise suggested, that the court were not competent to

to review these regulations, as being made by the justices in consequence of powers delegated to them by statute.

Answered for the suspenders: 1mo, The imposing of regulations is a matter of extraordinary jurisdiction, which can be assumed by no magistrate, unless conferred by explicit and clear enactment of statute. The acts 1617 and 1661 do not confer on the justices any authority to fix the wages of mechanics, which could not, with any propriety, have been subjected to a general rule, as the value of their labour must differ so widely, according to the skill of the mechanic in his art. Except in so far as respects country-labour, these statutes are solely relative to the price of made work. This is the obvious meaning of the words, and was the object of police at the time. From the 1462, down to the period of these acts, a number of statutes are found for regulating the price of made work; Ab. of stat. v. Police; but none for regulating the wages of journeymen.

The statute 6th Ann, c. 5. gives the justices of peace in Scotland the powers of the English only in as far as relative to the preserving the peace. But, at any rate, the English justices have not the powers here contended for; Blackstone, B. 1. c. 24. § 2. and Burn, *voce* Servants. It was denied that country justices ever, in practice, assumed the power of making regulations of this kind for artisans.

2do, Although the justices had been vested with sufficient powers, the regulations themselves being impolitic, ought not to be supported. Restrictions on the price of labour are contrary to the principles of sound policy, and defeat the purpose for which they are intended.— Exceptions were likewise taken to particular articles concerning the houses of call.

The court were of opinion, That they were competent to review the proceedings of the justices of peace in this case, and that the justices have sufficient authority to make regulations fixing the wages of mechanics.

- ‘ The Lords repelled the reasons of suspension, and found the letters
- ‘ orderly proceeded, without prejudice always to the journeymen-
- ‘ taylor to apply to the justices of the peace, when they can
- ‘ show cause why any proper rectification or alteration in their
- ‘ present regulations ought to be made.’

A&A. G. Ferguson.

Alt. Erskine.

No. XXXVIII.

July 28. 1778.

ANNE TURNBULL,

Against

GEORGE TURNBULL, and others.

Import of a legacy to the parent in liferent, and children in fee.

GEORGE TURNBULL executed a settlement of his whole effects on his nephew George Turnbull, by which the nephew was burdened with a provision 'of 2000 merks to Janet Turnbull his niece, in liferent, and to her children in fee.'

Janet had several children, all of whom outlived the testator, but pre-deceased herself. After her death, this legacy was claimed by different parties. It was insisted, *1mo*, for the heir, That the legacy had fallen by the death of Janet and her children. *2do*, for Davidson, Janet's second husband, That it belonged to him, *jure mariti*. *3tio*, for Anne Turnbull, That she had the right to succeed to this legacy, as nearest of kin to Janet, her sister-german. *4to*, for the children of Davidson by a former marriage, That it belonged to them as nearest in kin to Janet's children, their brothers and sisters by half blood.

In this competition, the Lord Ordinary pronounced the following interlocutor : In respect the persons in whose favour the legacy in question was conceived, outlived the testator, and the term of payment thereof, finds, That the same has not fallen, but is now exigible from the testator's representatives : Prefers the children of Davidson, as representatives of his children by Janet Turnbull, to the said legacy, and annualrent due thereon.'

Pleaded for Anne Turnbull, in a reclaiming petition : The provision to the children of Janet was a provision *liberis nascituris*, as well as to her children then existing. But, as the fee of the subject could not remain *in pendente*, Janet was, in the construction of law, *fiar* ; and the eventual fee provided to the children imported nothing more than a *spes successionis*, or substitution, to take effect after their mother's death ; Children of Frog *contra* his creditors, 25th November 1735 ; Sillie *contra* Riddell, 1741 ; Kilkerran, *voce* *Fiar*. If the fee was in Janet, the petitioner, as her nearest of kin, must be entitled to take up the succession.

The Court refused the petition, without answers.

Act. Blair.

Alt. G. Wallace.

No.

No. XXXIX.

July 30. 1778.

WILLIAM LOW,

Against

Captain LEWIS DRUMMOND.

Import of § 73. of the mutiny act.

ON the 26th January 1778, Macgregor, recruiting serjeant for Captain Drummond, enlisted Low and two others, by giving them some shillings in the King's name.—On the 28th Macgregor went with a party to bring them to attest, but desisted, on a suspicion that they would be rescued; and, on the 29th he applied to the justices of peace, by petition, praying for warrant to bring them to be examined.—Answers to this petition were given in upon the 30th for Low and the other two, in which they declared their refusal to attest, and consigned L. 3 as smart-money. They likewise alledged, that they had been unfairly enlisted, upon which a proof was allowed and taken.—The justices, upon advising the whole, found it proven, ‘ that the respondents were legally enlisted as soldiers, and that they cannot get off now upon payment of the smart-money.’ This judgment was brought under review of the court by suspension, at the instance of the respondents.

The merits of the question betwixt the parties turned upon the interpretation of the 73d sect. of the mutiny-act, by which it is enacted, ‘ That when, and so often as any person, or persons, shall be enlisted as a soldier, or soldiers, in his Majesty's land-service, he and they shall, within *four days, but not sooner than 24 hours*, after such enlisting, respectively, be carried before the next justice of the peace of any county, &c. and before such justice, or chief magistrate, he, or they, shall be at liberty to declare his, or their, dissent to such enlisting; and, upon such declaration, and returning the enlisting money, and, also, each person so dissenting paying 20 shillings for the charges expended, or laid out upon him, such person or persons, so enlisted, shall be forthwith discharged and set at liberty, in presence of such justice, or chief magistrate: But if such person, or persons, shall refuse, or neglect, *within the space of 24 hours*, to return and pay such money, as aforesaid, he or they shall be deemed, and taken to be enlisted, as if he, or they, had given his, or their assent thereto, before the said justice, or chief magistrate.’

Under this clause of the act, the suspenders insisted that they were free; having entered their dissent, and consigned their smart-money, within the time required by the statute.

Pleaded

Pleaded for the charger: 1mo, The statute indulges the enlisted person with 24 hours from his enlistment, to deliberate whether he chooses to refile or not, but with no longer time. He does not get free by consigning the smart-money, and returning the enlisting-money, unless these requisites are performed within that time; for both the periods of 24 hours, mentioned in this clause, must be understood as commencing from the act of enlistment. This is specially provided as to the first; and, though it is not again repeated in the part of the clause relative to the other, within which the consigning, &c. must be performed, yet no other period of commencement being mentioned, that in the beginning of the clause must be understood as applying to it, as well as the former. The consignment, therefore, made by the suspenders, came too late.

2do, Supposing the consignment had been made in proper time, the suspenders did not return the enlisting-money, as this clause requires; and, therefore, they could not refile.

Answered for the suspenders: Though the act does not expressly say from what time the last mentioned 24 hours commences, the form of the sentence points it out. This period of 24 hours must be understood as relative to what was mentioned in the immediately preceding part of the sentence, and computed from the time of appearance before a magistrate, to give an assent, or dissent, to the enlisting. The returning the gratuity, and consigning the smart-money, are evidently the consequences of dissenting.

A contrary interpretation would involve the act in a contradiction. In every case where the enlisted person is brought before a magistrate, he is, by the statute, entitled to his option, either of assenting to the enlistment, or refusing from it. But he cannot be carried before a magistrate until the lapse of 24 hours from the enlistment; consequently, the 24 hours allowed for returning the enlisting-money, and consigning the smart-money, cannot be understood to run from the act of enlistment; for that would annihilate the option which the statute expressly gives the enlisted person to dissent, when brought before the magistrate.

3tio, The act was sufficiently complied with by consigning the smart-money, there being no enlisting-money. The shilling given to each in the King's name is merely a symbol of the enlistment, not the gratuity for enlisting. The returning of the latter was the object of the act. This symbol is like the earnest given in hiring a servant, or making a bargain, which is never considered as part of the price or wages, and is called '*dead earnest*'; Ersk. B. 3. t. 3. § 5.

The suspenders likewise insisted on two separate grounds of suspension: *1mo,* That, from the proof, it appeared that they had not originally given any consent to be enlisted. *2do,* That there had been no proper requisition on them to attend the magistrate to attest; as the petition to the justices only requires their attendance to be examined.

The judgment of the court was, 'Find it proved, that the three suspenders were enlisted by M'Gregor, to serve in the charger's company of the Athol regiment, upon the night of the 26th of January last, by the symbol of a shilling given them in the King's name,
' but

‘ but that no enlisting-money, or bounty, was paid, or agreed to be paid, to them : Find, that the only attempt to bring them before a magistrate, in order to be attested, was by a petition presented to the justices of the peace upon the 29th day of January, praying warrant for bringing them before the justices for examination, which was served upon the suspenders that evening : And find it proved, that, upon the day following, and within less than twenty-four hours after such service, they appeared, and judicially declared their dissent to the enlisting, and consigned, each of them, in the hands of the clerk, twenty shillings for the charges laid out upon them ; and find, that, upon such declaration and consignment, they were entitled to be discharged under the statute : Find, that the shilling given by the serjeant as the symbol of enlisting, was properly part of the charges laid out upon them ; and, therefore, find that they were not obliged to consign such shilling over and above the twenty shillings ; and, therefore, sustain the reasons of suspension, and suspend.’

No. XL.

August 4. 1778.

WILLIAM BOGLE,

Against

JOHN YULE.

Precognition taken previous to a civil action.—Examination of the defender on a charge of fraud.

JOHN BOGLE, a short time before his death, granted an heritable bond over the lands of Hamilton-farm to Yule, for L. 4850, on the narrative that he stood indebted to Yule in that sum, by bills and other vouchers, delivered up when the bond was given. On the death of John, William Bogle, heir of provision to him in these lands, took an *ex parte* precognition before the magistrates of Glasgow, relative to the manner in which this bond was granted ; and, in this precognition, Yule himself was examined. The papers found in Bogle’s repositories were, likewise, upon the application of the heir, taken into the custody of the magistrates.

The heir afterwards brought a challenge of this heritable bond, as granted on death-bed, without any just or onerous cause ; and insisted, that the defender should, in the *first* place, be personally examined on the value alledged to have been given for this bond, and all circumstances relative thereto.

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The defender did not object to the examination, but contended,—
1mo, That the precognition previous to the civil action, tending to
 prejudicate the witnesses, was illegal ; and that, before being examined,
 he was entitled to see, not only his own declaration, but the whole
 precognition.—*2do*, He is likewise entitled previously to see the vouch-
 ers of debt, given up when the bond was granted, and the other papers
 found in Mr Bogle's repositories.

Answered for the pursuer : *1mo*, The precognition was taken from
 a suspicion, at the time, that the deed was forged, in order to know
 whether there were grounds for a criminal prosecution. The defender
 is entitled to see the whole precognition before the proof goes out, but
 not before his examination ; for that would defeat the purpose of it,
 and enable the defender to frame a story consistent with the evidence.
2do, For the same reason, the defender is not entitled to see the vouch-
 ers, and other papers, found in Mr Bogle's repositories.

The court highly condemned the conduct of the pursuer in taking
 the precognition ; but did not think the defender entitled to see the
 evidence of the witnesses in it, nor the writings found in Mr Bogle's
 repositories, previous to his examination.

The court remitted ' to the Lord Ordinary to take the defender's
 ' declaration on the facts and circumstances set forth in the con-
 ' descence ; but, before proceeding thereto, ordains the former
 ' declaration, emitted by the defender before the magistrates of
 ' Glasgow, to be shown to the defender, and thereafter to be again
 ' sealed up.'

No. XLI.

August 5. 1778.

ROBERT CARRICK,

Against

JOHN CARSE.

Condictio indebiti.

IN 1768, Carrick became bound, as cautioner for Robert Robb to
 Carse, and others, in a bond for L. 100, payable at Whitfunday,
 and containing a clause of relief in favour of Carrick. No demand
 was made for this money till November 1776, when Robb having
 become bankrupt, Carse required payment from the cautioner, Carrick,
 of the principal sum, and half a year's interest then due. Carrick,
 after

after looking at the bond, said, 'there was no help for it,' and paid the money.

Next day he required of Carse to repeat the money, on this ground, that he had paid it by mistake, when not bound, seven years having elapsed from the date of the bond. Carse refusing to comply with the demand, Carrick brought an action for repetition against him and the other creditors. The pursuer admitted that he was in the knowledge of the law at the time he made the payment, but alledged, that he was ignorant of the fact that the seven years were elapsed.

Pleaded in defence, The money paid was due at the time by the pursuer to the defender, *jure naturali*.—The statute 1695, c. 5. gives the cautioner an exception, after the lapse of the seven years, on which, if sued in a court of law, he may refuse payment: But it does not take away the obligation in equity on the cautioner, to indemnify the creditor, who, on his faith, trusted his property with the principal debtor. It is an established point, that, where a person lies under an obligation, *jure naturali*, to pay, if the money is paid, no action for repetition lies; l. 13. et 16. *De Cond.*; *Voet. de Pact.* § 2. et 4.; *Ersk.* p. 466. § 54.; *Bankt.* p. 216. § 27.

2do, Even where there is no obligation in equity, repetition of money paid from alledged ignorance of law in every case, or of fact, when gross and inexcusable, cannot be required, if payment was made to the proper debtor, *qui suum recepit*; *Voet. l. 12. t. 6. § 7. l. 6. § De jure et fact. ign.* The pursuer admits that he knew the law. As he read over the bond, it must be presumed he knew the fact, that seven years were elapsed from its date. At any rate, it is a fact of that kind, of which the law does not excuse the ignorance. And therefore, the case is the same as if he had made payment, knowing that he could have got quit of the debt under the exception given by the act 1695, but not choosing to use it.—Action of repetition, therefore, does not lie.

Answered for the pursuer: 1mo, The principal debtor, who receives and has the benefit of the money, lies under a moral obligation, independent of his bond, to restore what he received. But the cautioner receives nothing, and lies under no other tie to the creditor, but the civil obligation which he comes under in the bond, the extent of which has been regulated by law.—The statute 1695 does not merely give an exception against payment to the cautioner, after lapse of the seven years, but declares him, '*eo ipso*, free;' so that the obligation is totally at an end, as much as if it had never existed. This is laid down, and the distinction betwixt this statutory liberation, and that of prescription, is illustrated by *Bankton, v. 2. p. 172. § 38. 181. § 74.*; *Ersk. p. 531. § 24.*—It is therefore the same thing as if it had been expressly stipulated in the bond, that the cautioner was to remain bound for seven years, and then to be free.

2do, When there is no obligation in equity to pay, it makes no difference whether the mistake arises from ignorance of law or fact, of whatever species. Unless it appears that the money was given as a donation, it must be restored on the common principles of justice: For the receiver holds it *sine causa*, as he can derive no right from mere

mere error; and the person who put the money into his hands continues in the just right to it, notwithstanding the mistake.

This is the received doctrine of our law; Stirling, 26th July 1733; Dict. v. Cond. Ind.; Bank. v. 1. p. 216. and p. 467; and is agreeable to the principles of the civil law. That law distinguishes betwixt the case where the person who falls into an error is in *lucro faciendo*, and when he is only in *damno vitando*. In the former case, the civil law did not restore him against errors in law, or gross errors in fact, such as *error facti proprii*. But, in the latter, every species of error was excusable; l. 27. de usu et usurp.; l. 15. § 2. de contr. emp.; l. 2. 3. 4. 7. de jur. et fact. ignor. Vid. Vinn. Sel. Quæst. l. 1. c. 47. In this instance the pursuer is clearly in *damno vitando*, seeking back what he had parted with only by mistake, and which, if not restored, he can never recover, as the debtor is bankrupt. The person who attempts to profit by this mistake, *non suum recipit*, though a like sum is due him by another. It is only where there is no error, and the debt is paid by a *negotiorum gestor*, for the debtor, that the creditor is said, in the civil law, *suum recipere*, l. 2. 6. de cond. ind. But, when that does not appear, *alienum recipit*: for the debt due to him by one, can give him no title to the money of another.

That no donation was meant in this case, is evident from the transaction, and the words used by the pursuer when the payment was made.

Observed on the bench: It makes no difference, whether the payment was made from error of law or of fact; it is sufficient that it proceeded from mistake; and, when payment is made *sine causa*, it will be presumed to have proceeded from error, and not donation, unless the contrary can be proved. The payment is made *sine causa*; for after the lapse of seven years, there was no obligation, natural or civil, on the cautioner.

The Lord Ordinary 'found the defenders liable, conjunctly and severally, to repeat and pay back the sums libelled.'

The court adhered to the Lord Ordinary's interlocutor, on advising a reclaiming petition and answers; and again adhered, on advising a second petition and answers.

Að. Ilay Campbell.

Alt. Rae, Rolland.

No.

No. XLII.

August 5. 1778.

Sir WALTER MONTGOMERY-CUNINGHAME,

Against

JOHN MONTGOMERY-BEAUMONT.

Provision by a wife to her husband out of lands settled under a prohibition to alter the succession.

JAMES MONTGOMERY of Lainshaw, executed a deed settling his estate, failing heirs of his own body, upon his sister Elizabeth, then married to Captain Montgomery-Cuninghame, and a series of heirs in succession. The deed contained a prohibition on the heirs to alter the order of succession, 'or to do any other act or deed, directly or indirectly, whereby the same may be any ways altered.'

On the death of Mr Montgomery without issue, the succession to his estate was taken up by his sister Mrs Cuninghame, under this deed. Her husband died, and she entered into a second marriage with John Beaumont; during the subsistence of which she executed a bond for an annuity of L. 300 in his favour during his life, payable out of the estate of Lainshaw.

Upon her death, Sir Walter Montgomery-Cuninghame, her eldest son of the first marriage, succeeded to this estate. Finding it deeply burdened with debts, he brought a reduction of this bond of annuity, as falling within the prohibition to alter in the settlement of the estate.

Pleaded for the pursuer: The prohibition to alter in the settlement, is a good title for voiding every *gratuitous* deed in *contravention* of it; Stair, Inst. B. 3. t. 3. § 39.; Ersk. B. 3. t. 8. c. 23.

The bond of annuity under challenge is a deed of this kind; for, *imo*, it is *gratuitous*. There is no kind of obligation on a wife to make a provision for her husband; l. 33. *D. De Don. inter Vir. et Ux.* But although this annuity to the husband should be considered in the same light as a post-nuptial settlement on the wife by a husband, it must be held as purely gratuitous, in so far as it is immoderate, and unsuitable to the situation of the estate. In this case, the estate is so deeply involved, that there would be no reversion to the heir if the bond were sustained, and even not enough to pay the annuity itself.

2do, It is in *contravention* of the prohibition to alter the succession. The defender's right of annuity is a right by investment in the estate. If this bond is good, it is only after his death that the pursuer would succeed to the enjoyment of the estate.—The heir, therefore, is ef-

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factually denuded of the use of his lands, which is an alteration of the succession to every beneficial purpose.

Answered for the defenders: Limitations in the settlement of estates operating to lessen, or defeat a vested interest of fee, are unfavourable. And on this principle it has been justly established, that all acts, not expressly, and in legal technical language prohibited, are within the powers of an heir of entail, as well as effectual against the estate.—Thus, it is a fixed point, that a mere prohibition to alter, such as the present, does not tie up the heir from burdening the lands with debt, or even selling the whole estate. Not only would the purchasers, in such a case, be safe, but the price would be the unlimited property of the heir who sold it: For the heir in possession has the same right to found on the want of precise and express terms, as the creditor or purchaser.

Mrs Montgomery's powers over this estate, therefore, went much further than to the executing of this deed. She might have sold the whole of it, and made a present to her husband of the price. She has only burdened it with a temporary right in his favour, which not being expressly prohibited, she had full power to grant, notwithstanding the prohibition to alter the succession.

2do, This deed is not gratuitous, in the proper sense of the word, proceeding on no antecedent obligation. Husband and wife are under mutual obligations to assist and provide for each other. It has been repeatedly decided, that provisions to husbands in post nuptial contracts of marriage, are not reducible as *donationes inter virum et uxorem*; M'Gill, November 22. 1664; Stair; Chalmers, Jan. 25. 1710; Forbes; Stirling, July 31. 1716; *Bruce's MS.*

Observed on the bench, If the merits of the cause depended upon the rationality of the deed, it would be proper to delay the decision till the real value of the estate was known; but that is unnecessary, as the deed does not counteract the prohibition in the settlement, and will be good though it exhaust the whole estate.—The court were of opinion that there was a natural obligation on the wife to provide the husband when in her power; and the husband, in such provision, will not be considered as a stranger.

The court 'repelled the reasons of reduction;' and adhered on advising a reclaiming petition and answers.

Aff. *Ja. Boswell, Rofs.*

Alt. *Ilay Campbell, Buchan-Hepburn.*

No. XLIII.

August 7. 1778.

JOHN DALRYMPLE, and others,

Against

JAMES STODART, and others.

Powers of the convention as to making alterations on the sett of a borough.

THERE are 14 incorporations in the town of Edinburgh, who have each a deacon chosen annually by the craftsmen. Out of these deacons, six are chosen by the old council into the new, and vote in all questions as a part of it. The other eight, who are called extraordinary deacons, have only a vote in electing the magistrates, and certain other matters.

The incorporations, in electing their deacons, are each obliged to give in a leet of six persons to the town-council, from which a leet of three is sent back to them by the council, out of which the deacon must be chosen.

This restraint on the freedom of their choice had, on former occasions, been complained of as a grievance. In 1777, Mr Stodart, then a counsellor, moved in council, ' That the magistrates and town-council should make an application to the convention of the royal boroughs, to alter, by their authority, this part of the sett; and to declare, that each incorporation of the city shall be at liberty to elect a deacon yearly, in time coming, from any of their own freemen, in a free election, without any controul by having their leets shortened by the town council.'

This motion was opposed by the Lord Provost, and others of the ordinary council; but the eight extraordinary deacons insisting for a vote, it was carried by a majority of five.

In a suspension of this proceeding, at the instance of the Lord Provost, and others,

Pleaded for the suspenders: 1mo, The extraordinary deacons have no title to vote in council, except in certain cases specified in the decret-arbitral of King James VI. 1583, and again in that of Lord Ilay, in 1730.—As the matter of Mr Stodart's motion falls not under any of these excepted cases, the eight deacons had no vote, consequently the majority of the council was against the motion.

2do, The convention of royal boroughs have no powers to make any innovation on the established sett of a borough. When once the constitution of any corporation is established, the rights arising therefrom

from to the merchants, crafts, and all concerned, are as inviolable as rights of private property; Incorp. of Glasgow, 15th February 1775.—Nothing less than a parliamentary power can take away, or alter, the rights so vested. Courts of justice must support them.

The convention has no such parliamentary powers. What were the powers of the great chamberlain, when that officer was at the head of the boroughs, are little known. But there is no evidence that ever they extended to the giving, or altering, the sett of a borough.—The convention was established by parliament; and all its powers are derived from the acts 1487, c. 11. 1478, c. 64. and 1581, c. 19.—The authority given to it by these statutes, is merely that of making regulations relative to commerce, and attending to what concerns the general benefit of the boroughs.

As to the powers which the convention, in practice, exercises, it is true, that old setts have been altered by the convention, in cases where there was either a submission, or a surrender, by all parties having interest. How far they have authority to pronounce such decrees-arbitrary in these cases, it is unnecessary to consider: For, if any party having interest objects, the convention does not assume, nor pretend to the power, of making any alteration on the sett. They decline themselves in such cases, as appears from their records; Magistrates of Aberdeen, 15th June 1590; Perth, August 1652.

Answered for the chargers to the first reason of suspension: The extraordinary deacons are proper parties to every measure concerning an alteration in the sett of the borough. They were parties to the submissions to King James VI. and to Lord Hlay, in both of which similar questions were agitated.

To the second reason of suspension: It is premature. Any objection to the powers of the convention, ought first to be made in the convention itself, when the question is brought before them.

It is likewise groundless. The great chamberlain antiently possessed a supreme jurisdiction, and extensive powers, in superintending the police of the boroughs.—In his court of four boroughs, he reviewed the sentences of inferior borough jurisdictions. No appeal lay to parliament from their judgment; M. T. C. B. c. 17. There is no certain evidence where the setts of the boroughs originated. In none of the ancient charters of these boroughs, extant, are there any traces of a sett. It is highly probable, however, that they proceeded from the chamberlain-court; though instances cannot be given, as the records of the court are lost.

The convention came, in place of the chamberlain, as to the superintendence of the boroughs.—By the act 1487, c. 3. the convention is ordained to meet, ‘with full commission to commune and treat upon the welfare of merchandize, the gude rule and statutes for the common profite of burghs.’ These words are sufficient to imply a power of giving new setts to boroughs, and altering old setts; and are explained to have had that meaning by usage. The convention, ever since, have exercised these powers, as appears from the records, particularly in the cases of Dumfermline, in 1618; Elgin, 1705; Inverness, 1676; Wick, 1708; Inverkeithing, 1741; Glasgow,

gow, 1748 ; Kinghorn, 1769. The powers of the convention to alter setts were expressly recognised by the Court of Session in the case of Inverness, 11th February 1723, *Edgar*.

Replied for the suspenders : In the instances adduced, where the convention altered the sett, there was either a submission by all parties concerned, or a general consent. The judgment of the court, in the case of Inverness, does not apply. All that the court found was, that the convention could make alterations in a sett formerly given by the convention itself, which was the case of the sett of Inverness.

The court were of opinion, That the convention had no powers to alter the sett of the borough ; and that this was a competent ground of suspension.

‘ The Court sustained the reasons of suspension ;’ and adhered on advising a reclaiming petition and answers.

A&C. *Crosbie, Rae.*

Alt. Advocate, *Ilay Campbell, M'Laurin.*

No. XLIV.

August 9. 1778.

F O O T E and M A R S H A L L,

Against

M A J O R S T E W A R T.

*Jurisdiction of the commissioners of supply under the comprehending act,
18th Geo. III.*

FOOTE and Marshall were brought before the commissioners of supply for the county of Kinross upon the comprehending act, 18th Geo. III. and were ordained to be delivered up to Major Stewart. At the same time, they were incarcerated by warrant of the commissioners. Foote and Marshall offered a bill of suspension and liberation, which, with answers and replies, were taken to report by the Lord Ordinary.

Pleaded for the complainers : The words of the act of parliament are, ‘ That all able-bodied, idle, and disorderly persons, *who cannot, upon examination, prove themselves* to exercise, and industriously follow, ‘ some lawful trade or employment, shall be levied,’ &c. The complainers, when brought before the commissioners, offered instant evidence that they did not fall within the description of the act, both by certificates of their good behaviour, and by the immediate testimony of witnesses, to prove that they were hired servants, and, therefore, following ‘ a lawful employment.’—The commissioners,
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contrary to the terms of the statute, refused to receive the evidence of the certificates, or the witnesses.

Other parts of the proceedings of the commissioners were likewise complained of as illegal.

The charger, waving entirely any vindication of the proceedings of the commissioners, objected to the competency of the court, and contended, that they had no jurisdiction to review the sentence of the commissioners acting under the statute. The powers conferred on the commissioners are created by the statute, out of the course of common law, on account of the necessities of the state, mentioned in the preamble of the act. They are ordained to examine the persons brought before them, and, if found within the description of the act, to deliver them to the military officers on their receipt. It is declared, 'That, from and after such delivery, and reading the said articles of war, every person so raised shall be deemed a listed soldier to all intents, &c. ; and the person so listed shall not be liable to be taken out of his Majesty's service by any process, other than for some criminal matter.'—No civil court, therefore, can give any relief to such persons as are adjudged by the commissioners.—A mode of reviewing their sentence, by a second meeting of the same commissioners, is provided in the act itself. If the second meeting are of opinion that the person adjudged does not fall within the description of the act, they are required to certify the same to the secretary at war, 'who, on receipt of such certificate, shall cause the man forthwith to be discharged.' This part of the act likewise shows, that it was not the intention of the legislature to allow any review of the sentences of the commissioners in courts of law ; Robertson *contra* the justices of Stirlingshire, July 25. 1744.—A contrary interpretation would defeat the purposes of the act.

Replied for the complainers : The rule of law is, that, where a new civil jurisdiction is created by statute, with a power to the new erected court to judge in special matters, its judgments are subject to the review of the supreme civil court, unless by the statute it is declared otherwise in express terms. New Col. v. 1. p. 108. ; Ersk. p. 23. and 24. A review of the proceedings in question cannot be denied without counteracting this important maxim of law ; for this statute has no where said that the judgments of the commissioners shall not be subject to the review of the supreme court.

It is not even to be implied or supposed from the passages founded on. The power of reviewing their own sentence, given by the statute to the commissioners, affords no argument against the jurisdiction of the court to review the sentences of both, or either of the meetings. In most cases, an appeal is admitted from the sentences of justices of peace to the quarter-sessions. But the supreme court is entitled to review the proceedings of all their meetings, unless excluded by statute.

The Court were of opinion, that, from the terms of the statute, it was the meaning of the legislature, that the sentence of the commissioners should not be reviewable by any court of law.

The court refused the bill.

ALEXANDER ORME,

Against

ANDREW BARCLAY, and others.

Writer's Hypothec.

ALEXANDER ORME writer to the signet, was employed by the tutors of Robert Wright to make up the titles of their pupil to his father, Wright of Freuchie, as heir, *cum beneficio*, and to bring an action of ranking and sale of the estate, at the instance of the heir. For these purposes, the title-deeds of the estate were put into his hands. The process of sale was carried on, and the expence of it debursed by Mr Orme, until the ranking was finished; after which it was allowed to lie over. Upon the majority of the heir, a new process of ranking and sale was brought at the instance of his father's creditors, in which Orme appeared, and

Pleaded: That he was entitled to be ranked for the expence of the former process as a preferable creditor, from his right of hypothec on the title-deeds of the estate still remaining in his hands.

Answered for the creditors: The claimant is not a creditor to the deceased Wright of Freuchie in this accompt. He is only creditor to the heir and his tutors and curators, who were his employers. But the heir of a bankrupt has no more right to withdraw the title-deeds of the bankrupt, than any part of his estate from the creditors, and cannot hypothecate them for payment of what is advanced and furnished to himself.

The court 'repelled the claim founded on the right of hypothec, 'reserving action to the pursuer against the minor and his tutors 'and curators.'

Lord Ordinary, *Alva.*For Orme, *Ferguson.*Alt. *Scott.*Clerk, *Gibson.*

No. XLVI.

November 28. 1778.

Colonel ARCHIBALD CAMPBELL, and his Trustees,

Against

ROBERT SCOTLAND.

Intrinsic quality.

IN 1775, Colonel Archibald Campbell appeared as candidate to represent, in the ensuing parliament, the district of boroughs, of which Dunfermling is one, and employed Robert Scotland, a shop-keeper in that borough, as his agent for managing his political interest there. A large gratuity was agreed to be given to Scotland for his trouble; and, in consequence of his undertaking this business, money was, from time to time, put into his hands by different persons for behoof of Colonel Campbell, to the amount of about L. 3000. No receipt or voucher was given by him for any part of this money.

It was afterwards suspected by Colonel Campbell and his friends, that Scotland had betrayed his interest in the borough, and favoured the other party. Colonel Campbell himself having gone abroad, and named trustees for managing all his affairs in this country, Scotland was required by them to shew his accompts for the money he had received; and, upon his declining to comply, the trustees brought an action of compt and reckoning against him, in their own name, and that of their constituent, and insisted that he should, in the first place, be ordained to produce his accompts. Scotland acknowledged his having received the money; but

Pleaded in defence against this action: As the defender's acknowledgment is the only evidence of his having received the money, it must be taken subject to the intrinsic qualities under which he makes it, viz. That he got the money for the purpose of employing it in bribery; and actually employed it to that purpose. The trust committed to the defender was therefore of an illicit nature, and all action on it is denied by law. The circumstance, that the defender, by undertaking the trust, was equally criminal as the pursuer, does not preclude him from pleading this exception to the action. It is an established point in the case of smuggling contracts, and others of a like kind, where both parties are equally criminal, that the defender is not barred on this account from pleading the exception. Were it otherwise, the object of the law in denying action on illicit contracts would be entirely defeated.

Answered

Answered for the pursuers: That Colonel Campbell had not entered into any illicit compact with the defender: That the money was put into his hands for the purpose of giving entertainments to the people; but that he had received no instructions from the defender to employ it in bribery. The pursuer is charged with a crime, and he must be presumed innocent till his guilt is shown. The defender's averment fixes only his own turpitude; but he must establish by proof the unlawful concert he alledges, otherwise his defence, which rests on the hypothesis, that an unlawful agreement had taken place, falls to the ground.

Observed on the bench: If the pursuer could produce any voucher of this money being in the hands of Scotland, the averment of a *turpe pactum* would not be sufficient to screen the defender from accounting; but, as the receipt of the money rests on the acknowledgment of the defender, the *causa dandi* is an intrinsic quality, and cannot be separated from the other parts of it. The judgment was,

‘ Sustain the defences, and affoilzie.’

Lord Ordinary, *Braxfield.* A&C. *Ilay Campbell.* Alt. *Rae, M^rLeod.* Clerk, *Tait.*

No. XLVII.

December 2. 1778.

H U G H H A Y,

Against

A N D R E W W I L L I A M S O N.

Pasturage in the church-yard.

HAY and Low, two heritors in the parish of Arngask, brought an action before the sheriff of Fife, against Andrew Williamson, minister of the parish, concluding, *inter alia*, That he should be decerned to desist from pasturing his cattle in the church-yard in all time coming. The sheriff found, ‘ That he was only entitled to cut the ‘grass in the church-yard, but not to pasture his bestial thereon;’ and discharged him from doing so thereafter. The defender, in a bill of advocacy, alledged, that it was the general practice over Scotland for ministers to feed their cattle in the church-yard.

Answered for the heritors: The law does not allow parish-churchyards to be put to any use but that of the interment of the dead. In every other respect they are *extra commercium*; and the minister has no more a right to feed his cattle in them than he has to plow them up,

up, and raise a crop out of them. The Lord Ordinary refused the bill so far as it respected this article.

The court, upon advising a reclaiming petition and answers, adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Braxfield.* Aft. *D. Graeme.* Alt. *Robertson.* Clerk, *Orme.*

No. XLVIII.

December 18. 1778.

J O H N M O N R O E,

Against

J O H N J A C K S O N, and others.

Jurisdiction of the High Admiral-court in Questions of Prize.

BY the statute 16th Geo. III. commonly called the *Restraining Act*, it was enacted, that all vessels belonging to the inhabitants of certain colonies in America, (and, among others, South Carolina), trading to or from these colonies, with their cargoes, should become forfeited to his Majesty. Subsequent to the act, letters-patent were issued, under the great seal, directed to the board of admiralty, authorising and enjoining them 'to require our high court of admiralty in England, and the lieutenant and judge of the said court, and his surrogate or surrogates, as also the several courts of admiralty within our dominions; and they are hereby authorised and required to take cognizance of, and judicially to proceed upon all, and all manner of seizures, re-captures, prizes, and reprisals, of all ships and goods already seized and taken, or which shall hereafter be seized and taken, and to hear and determine the same, according to the course of admiralty, and to adjudge and condemn all such ships.' The Lords of Admiralty afterwards issued a commission to the judge of the high court of admiralty in England, in the terms of the letters-patent.

In April 1777, the ship *George*, bound from South Carolina to Bourdeaux, was brought into the Frith of Clyde, having been seized by the crew in the course of her intended passage to France. In May following, his Majesty's procurator-general, in his office of admiralty, took the usual steps for bringing the ship and cargo to trial in the high court of admiralty in England; and, after various proceedings, the judge decreed the ship to be restored to a merchant-company by whom she was claimed; and condemned the cargo as prize and droits to his Majesty. A commission was, of consequence, issued from the English court, to apprise and sell the cargo; but, before the complete execution of this commission, the judge of the high court of admiralty
in

in Scotland, upon application from the procurator-fiscal, granted warrant to arrest the said ship and cargo ; and prohibited all persons from disposing of them, until further orders of court. Soon after, an action was brought into that court, by the procurator-fiscal, against the master of the ship, on the restraining act, for declaring the ship and cargo forfeited to his Majesty. Appearance was made in this action for the procurator-general of the English admiralty court, and the receiver-general of the rights and perquisites of admiralty there, who contended, that the action could not proceed, as the final judgments of the high court of admiralty in England were pronounced, both as to ship and cargo, before any step was taken in it. This plea, in bar of the action, necessarily brought on the question, Whether the high admiralty court in England was competent to try the ship and cargo ? upon which the validity of the plea depended. The judge-admiral found, ' That the procedure had in the high court of admiralty in England, ' and all the after procedure had in consequence thereof, relative to the ' ship or brigantine, the May or George, and her cargo, libelled, ' is void and null, and can be of no avail nor effect in law, as to the ' said ship and her cargo libelled : And therefore found, that the said ' John Monro, Esq; pursuer, may proceed in the present action, ' and that in the same way and manner, and to the same effect, as if ' no such procedure had been had relative to the said ship and her cargo.'

The defenders presented a bill of advocacy ; and the Lord Ordinary having taken the cause to report on informations,

Pleaded for the defenders : It is needless, in this question, to go back into the constitution and history of the high admiralty courts in England or Scotland further than the union. Before that time, the court of admiralty in England could have no jurisdiction in Scotland, as the two kingdoms were independent of one another.

The future jurisdiction of the admiralty court in Scotland was one of the subjects of discussion at the union ; and the manner in which it was settled is to be found in the 19th Article, and is in these words :

' That all admiral jurisdictions be under the Lord High Admiral, or ' the commissioners for the admiralty for the time being ; and that the ' court of admiralty now established in Scotland be continued ; and ' that all reviews, reductions, or suspensions, of the sentences, in maritime cases, competent to the jurisdiction of that court, remain in the ' same manner after the union as now, in Scotland, until the parliament of Great Britain shall make such regulations and alterations as ' shall be judged expedient for the whole united kingdom ; so as there ' be always continued in Scotland a court of admiralty, such as in ' England, for the determination of all maritime causes, relating to ' private rights in Scotland, competent to the jurisdiction of the admiralty court ; subject nevertheless to such regulations and alterations ' as shall be thought proper to be made by the parliament of Great Britain.'

The supremacy of the high-admiral in England, over all other admiralty jurisdictions, being thus specially settled by the Articles of Union, the high court of admiralty there has been considered as a British

high court of admiralty, competent to every question of prize where British subjects are concerned, into whatever port the vessel is brought. The admiral court in Scotland is kept separate and distinct as to matters of private right only. But the trial of prizes is founded on the public authority of the state; and therefore is a matter of public law, in which the court of admiralty in Scotland can claim no jurisdiction privative of the high court of admiralty in England.

That court, therefore, would be competent to the trial of a prize brought into a port in Scotland when taken in war with a foreign enemy. But, in this case, the ship and cargo were the property of the subjects of this country; and no judge-admiral had authority at common law to condemn these effects, their jurisdiction reaching only to the trial of prizes taken from a foreign enemy after proclamation of war. The express authority of statute was necessary to confer the powers which could entitle any admiral court to condemn this ship and cargo; and therefore the question is, In what judges the jurisdiction is vested by the restraining act, the letters-patent, and the commission from the Lords of Admiralty? But, in that statute, it seems to be understood, that the condemnation of prizes was to be either in the high court of admiralty in England, or in the courts of vice-admiralty. The forms of procedure established in the act apply only to these courts. No mention is any where made, in the act, of the admiralty court of Scotland; and, accordingly, no commission was issued to the judge of that court by the Lords of Admiralty; so that it does not seem to have been intended that such trials should at all come before it.

But the high court of admiralty in England is at least entitled to a cumulative jurisdiction with the court in Scotland in the case of prizes brought into the ports of that country. The jurisdiction committed to the judge of the former court to try all prizes falling under the act, was meant to be universal over all Great Britain. The statute contains no exception nor limitation in point of place; and his commission from the board of admiralty is in like manner unlimited in this respect.

Answered for the pursuers: The high admiral of Scotland had antiently extensive powers, both ministerial and judicial. The ministerial powers were exercised by himself; the judicial by his deputy, called the Judge of the High Court of Admiralty, who was vested with an important civil and criminal jurisdiction over all Scotland.

The jurisdiction of this court was not encroached on at the union. In no part of the articles is any thing to be found limiting the territorial jurisdictions of the courts formerly established in the respective kingdoms. These jurisdictions, therefore, in both countries, would have remained entire, though there had been no provision to that purpose; and, accordingly, in England, it was not thought necessary that any thing should be expressed with respect to their courts. But, from certain apprehensions entertained at the time, it was thought proper to provide some degree of security for the continuance of the jurisdiction of the courts of justice in Scotland. On this account, the pro-

provisions were made contained in the 19th article of union, by which the courts of session, justiciary, and admiralty, are continued in Scotland, with the same powers and jurisdictions which they had respectively before the union. And it is also declared, that no 'causes in Scotland be cognoscible by the court of chancery, Queen's bench, common pleas, or any other court in Westminster-hall; and that the said courts, or any other of the like nature, after the union, shall have no power to cognosce, review, or alter the acts and sentences of the judicatures within Scotland, or stop the execution of the same.'

While the jurisdiction of the court of admiralty was thus secured to it, an alteration was so far made in the office of high admiral, that, as before the union there were two high admirals, there should, for the future, be only one for both countries, who was to be at the head of that department of the state called the Admiralty of Great Britain.

This supremacy of the high admiral is expressed by these words in the 19th article, 'That all admiralty jurisdictions be under the Lord High Admiral, or commissioners for the admiralty for the time being.' It is the powers of the high admiral, in his ministerial department, which are here meant and intended. This passage has no reference to the admiralty court of law, which is not subject to the controul of the high admiral, nor the commissioners coming in his place. The judge of it, from his nomination, is vested with the whole jurisdiction belonging by law to that court, and acting in his judicial capacity, is totally unconnected with the board of admiralty, and must distribute justice independent of any orders from that board. The jurisdiction, therefore, of the admiral court of law in Scotland for determining the rights of parties, in all maritime cases remained with it, to the same extent after the union as before, and was secured by the articles of that treaty against any encroachment of other courts upon it, or any alteration but what should be enacted by express statute. One part of the antient exclusive jurisdiction of this court, was, the right of trying, in the first instance, all prizes taken and brought into the ports of Scotland; Balf. Pr. tit. Sea Laws; Stair, tit. Reprisals. And no reason can be given, why the judge of an English court should be entitled to encroach on this part of its jurisdiction more than any other. It is of no consequence in this question, that the forfeiture of prizes is founded on public authority. A claim on ships and goods as lawful prize is, in the strictest sense, a question of private right, though it is a public law from which it arises. Accordingly, no English judge has, before this instance, ever attempted to condemn a prize lying in a port in Scotland.

There is no distinction as to the point of jurisdiction, whether the prize is taken from a foreign enemy, in virtue of a proclamation of war, or from subjects, in virtue of a statute, such as the present: An act of parliament may point out an offence, and declare a punishment, without restricting the trial of it to any particular judge. Statutes of this kind are the most common; and the trial of cases falling under them, according to a fixed rule of law, is in that court to whose jurisdiction

jurisdiction cases of the like kind belong. The Restraining Act is a statute of that nature. It has declared the offence, and what circumstances the ship and cargo must be in, to warrant the forfeiture; but it has given no jurisdiction to certain courts of admiralty, exclusive of others, in judging the questions that may occur under it.

The court of high admiralty in Great Britain is not mentioned in this act as privative of others; on the contrary, the act supposes, that every court of admiralty is competent to try these questions. In the clause, vesting the property of the prize in the captors, it is added, 'being first adjudged lawful prize *in any* of his Majesty's courts of admiralty.'—Neither does the statute give any authority to the judge of the high admiral court in England to condemn prizes in the ports of Scotland, or any where, to which his jurisdiction, in that question, does not reach at common law. It is evident, that all the legislature had in view, was, that the same judges who are competent to try questions of prize in a war with a foreign enemy, should likewise be competent in the present case. The particular place within which either high-admiral, or vice-admiral courts in England are to exercise their jurisdiction, is not specially mentioned in the act; nor was there need of it; as every judge, high or subordinate, must understand that he cannot exercise his jurisdiction in the territory of another. And it is no excuse for such encroachment, that the act is silent in this respect, and does not in terms prohibit it.

If the statute does not authorise the extending of the jurisdiction of the English court to the ports of Scotland, no letters-patent, nor warrants, proceeding from whatever other authority, can have that effect. But the letters-patent, in this case, discover no intention of that kind. The board of admiralty is ordered to issue these requisitions 'on the several courts of admiralty within the King's dominions,' as well as on the high court in England. And they contain an authority, independent of the commission from the admiralty, to all of these courts, to judge in cases falling under the act.

The court were clearly of opinion, that the judgment of the high court of admiralty was well founded, and the bill was refused.

Lord Ordinary, *Stonefield*. Aft. *Hay Campbell*. Alt. *John Monro*. Clerk, *Tait*.

No.

No. XLIX.

December 18. 1778.

CREDITORS of ANGUS FISHER,

Against

*The CREDITORS of PATRICK CAMPBELL, and others.**Communication of a residuary security to co-cautioners.*

ANGUS FISHER merchant in Inverary, Captain James Campbell, and others, in consideration of a credit allowed them by M'Adam and Company bankers, to the amount of L. 600, upon a cash-accompt in the name of Fisher, granted their bond, obliging themselves, conjunctly and severally, to repay to the company the whole, or whatever part of this sum should be drawn out by Fisher. This credit was intended solely for behoof of Fisher, and Captain Campbell, obtained from him an heritable security over his lands in relief of his engagement, on which he was infest.

Fisher continued to operate on the cash-accompt, until the whole credit was exhausted. Thereafter the company drew a bill on the obligants in the bond for the principal and interest, which they accepted.

The company charged the acceptors with horning; and, as Fisher, the principal debtor, was now insolvent, it became necessary for the remaining co-obligants to take measures for paying up the debt. Accordingly, two of them (Campbell of Knap, and Ochiltree of Lindfaig,) paid each into the hands of Captain Campbell, their respective proportions; which, with his own share, being put by him into the hands of his agent, the whole debt was by the agent paid up to the bank, and an assignation taken of the debt from the bank, and of the bond, bill, and diligence thereon, in favour of Captain Campbell.

Several adjudications had been led against Fisher's lands subsequent to Captain Campbell's infestment. A ranking and sale was afterwards brought, in which Captain Campbell was ranked on his bond of relief for the principal sum of L. 600, or such part of the credit as had been drawn by Angus Fisher, in preference to the adjudging creditors, but with a reservation to the creditors of all objections to his claims until the division of the price. At that time, appearance was made for the creditors of Knap and Lindfaig, both then bankrupt, who insisted, that they were entitled to the benefit of the heritable security, on which Captain Campbell stood ranked, to the

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extent of the sums which Knap and Lindfaig had respectively advanced towards payment of the debt to M'Adam and Co. No objection was made on the part of Captain Campbell; but the postponed creditors of Fisher opposed this claim, and contended, that the co-obligants had no right to a communication of the security. In support of this objection,

Pleaded for Fisher's creditors: Captain Campbell obtained the infeffment of relief over Fisher's subjects solely for his own use. The other co-obligants rested on the personal security of Fisher; and Campbell was under no obligation to communicate to them his heritable security. There is no evidence, that, in paying the bank-debt, the co-obligants put their money into Campbell's hands, under any concert or stipulation of that kind. Though the money of the two other co-obligants came through his hands, the debt must be considered as paid up by all the three.

The case is the same as if the co-obligants had paid in separately their shares of the debt. Each of them continues to have that security for his relief which he originally had, and no other. Knap and Lindfaig remain mere personal creditors of the common debtor in relief. Campbell is entitled to the benefit of his heritable right over the subjects to relieve and secure himself, and, therefore, may avail himself of it, to operate payment, out of them, of what he contributed toward payment of the debt to the bank. But, to this extent alone can his security be of any avail, even to himself. The adjudging creditors of Fisher have, therefore, an interest to object to the co-obligants of Campbell getting the benefit of this heritable security for the shares of the debt paid by them. If the objection is good, the subjects will only be burdened with an heritable security to the extent of Campbell's share of the debt to the bank; and the whole benefit arising from the other co-obligants not obtaining a preference as to their shares upon the heritable security, will accrue to the postponed creditors of Fisher, and not to Captain Campbell.

Pleaded for the creditors of the co-obligants: It might have been more beneficial to Fisher's creditors, that every obligant had paid his own share, and only got an assignment to the corresponding part of the debt; but neither Fisher, nor his creditors, had any title to restrain the company from taking the payment of the whole debt from any one obligant, and assigning him to the whole. The transaction, therefore, between Captain Campbell and the company, must have its full effect, being lawful and permissible to both parties; and, by that transaction, the whole debt became heritably secured, and preferable on the estate of Fisher. Consequently the postponed creditors of Fisher can never have a title to any thing more than the reversion of the subjects, after the payment of this heritable debt to those who shall be found to have right to it. And the question, whether the co-obligants are entitled to a communication of the security, is entirely *jus tertii* to these creditors.

But, at any rate, the co-obligants would be entitled to insist for a communication of this security, even were Captain Campbell now
opposing

opposing it. It is evident on the face of the transaction, that it was understood betwixt Captain Campbell and the co-obligants, at the time they put the shares of the debt into his hands, that there should be a communication of the heritable security to them. On this account, Captain Campbell took the assignation from the bank of the whole debt in his own name. Had he been looking only to relief for himself, he would have taken the assignation in his name, to the extent only of his share of the debt.

If Captain Campbell had paid up the whole of this debt with his own money, he might have insisted against any of the co-obligants for payment of their share; but they, upon such payment, would have been entitled to an assignment of the separate heritable security in his person for their relief, to the extent of what they paid. It makes no difference that, in the present case, the money was paid up by the co-obligants to Campbell before he had made payment to the bank. The transaction is, in substance, the same.

The court found, ' That, after Captain Campbell himself is secured, ' there remains a residuary security to his co-cautioners, Knap and ' Lindfaig, on his infestment in the lands of Auchendryan, and ' therefore repels the objection to the decreet of ranking; and ' decerns.'

Lord Ordinary, *Halles.*

For creditors of Fisher, *Al. Abercrombie.*
Clerk, *Tait.*

Alt. *W. Craig.*

No. L.

January 12. 1779.

J O H N M ' F A R L A N E,

Against

G E O R G E B U C H A N A N.

In an exhibition ad deliberandum, a charter of adjudication and infestment, in favour of the defender in possession, not sufficient to bar the pursuer from insisting for exhibition of the grounds of the charter.

DOUGALD M'FARLANE, proprietor of the lands of Wester Auchendinnan, died in 1730, and, soon after, several of his creditors led adjudications of these lands, *contra hæreditatem jacentem,*

tem, James M'Farlane, his apparent heir, having renounced to enter. Upon these adjudications, the creditors entered into possession, and granted a factory to George Buchanan, over the lands, for uplifting the rents. The right to all these adjudications came afterwards into the person of Buchanan; and, in 1761, he obtained a charter of adjudication and confirmation from the subject-superior, on which he was infeft. In 1777, John M'Farlane, the son of James, then deceased, as heir-apparent to his uncle Dougal in the lands of Auchendinnan, brought an action of exhibition *ad deliberandum*, against Buchanan, concluding for exhibition of the adjudications, and whole other rights in his person, by which he possessed the lands. The defender produced his charter of adjudication and infeftment, and

Pleaded in defence against further exhibition: An action, *ad deliberandum*, from the nature of it, cannot reach farther than to the production of writings relative to subjects *in hereditate jacente*. It is always a good defence against the exhibition, that the predecessors of the pursuer were denuded; Stair, B. 4. tit. 3. § 7.; Bankton, B. 3. tit. 5, § 7.; and so it was found by the court, Bruce, February 7. 1680, Fount. In the present case, the titles produced show that the lands in question are not *in hereditate jacente*, but stand vested in the person of the defender. The pursuer's ancestor was denuded, or, what is equivalent, his *hereditas jacens* was carried off, and the pursuer's right, as heir to his ancestors, barred, with respect to these lands, by the expiry of the legal of the adjudications, which were in the person of the defender, and by the heritable titles which he made up as a single successor. The defender's charter and infeftment must first be set aside, before the right of apparenry in these lands can open to the pursuer, and, consequently, before he can have right to call for an exhibition of the adjudications, or other grounds of these titles.

But, further, the *beneficium deliberandi*, in this case, must be considered as expired, the action being brought at the distance of 47 years from the predecessor's death, and when the right to the subject had long stood vested in a third party.

Answered for the pursuer: Nothing less than the production of an absolute right, totally denuding the pursuer's predecessors, could afford a defence against a full exhibition, to the extent called for by the pursuer. This is established by the authorities on which the defender founds. But the title produced by the defender does not amount to a right of this kind. It is nothing more than a charter of adjudication, which can give no better right to the lands than the adjudications on which it is founded. These adjudications, therefore, are the only titles on which the defender can pretend to hold the lands; but, as they are not secured by a declarator of expiry of the legal, they can give no such absolute right to the property, as the law requires, to bar this action. They may have been extinguished by intromissions within the legal, and subject to a variety of other objections. Accordingly, it was found by the court, that the production of apprisings, though the legals were expired, were not sufficient to exclude an exhibition *ad deliberandum*, at the instance of the heir; Steele, January 12. 1665, Gilmore; Lady Fintray, January 1685, Home.

Replied

Replied for the defender : In the case of Steele, 1665, the apprisings were not completed by charter and infeftment. In the other decision of Lady Fintray, 1685, the question was with regard to an expired apprising against the brother of the pursuer. And the judgment of the court contained this explanation, ' unless the comprising had been led ' against the brother, as heir, or lawfully charged to enter heir to his ' predecessors.'

The court ' ordained George Buchanan to produce the adjudication ' in his person, with the grounds thereof, and conveyances thereto, and ' also the factory, in virtue of which he uplifted the rents of Wester ' Auchendinnan.

Lord Ordinary, *Braxfield.* Aft. *Baillie.* Alt. *Ilay Campbell.* Clerk, *Menzies.*

No. LI.

January 13. 1779.

JAMES PAISLEY,

Against

THOMAS RATTRAY.

Action of relief denied to a mandatory who had furnished goods on an open account, without taking a bill, as stipulated in the mandate to furnish them.

THOMAS RATTRAY interposed his credit with James Paisley, merchant, for Charles and James Nisbets, by a missive to Paisley, desiring him to furnish them with a parcel of sugars, to the amount of L. 10, and to take their joint bill for the amount; which, if not retired by them, he would see paid. The sugars were accordingly furnished. No bill was taken by Paisley; but Nisbet paid up the amount to him within two months, and Rattray's letter of credit was retired.

Nisbets afterwards applied to Rattray for a similar credit, who wrote in the following terms to Paisley: ' As Charles and James ' Nisbets have been punctual in retiring my former, and hope they ' will continue to do so, as they are careful and honest, if it is ' convenient for you to furnish them another parcel of sugars, to the ' amount of L. 10, or thereby, on their joint bill, at such date as ' you can agree on. If not retired by them when due, I shall pay it.' The sugars were furnished by Paisley; but no bill was taken by him from the Nisbets for the amount. James Nisbet soon after went to settle in London, and Charles Nisbet became bankrupt; upon which Paisley brought an action before the Magistrates of Edinburgh, against

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Rattray

Rattray and Nisbets, for payment of a balance still due of the price of the sugars furnished to the latter, on Rattray's credit, and the magistrates decerned against the whole defenders. The judgment was brought under the review of the court by a suspension, at the instance of Rattray.

Pleaded for the suspender : The charger deviated from the terms of his mandate, by not taking a bill from Nisbets for the amount of the goods furnished. This is sufficient to bar the action of recourse. The suspender is not obliged to show that he suffered a loss by this deviation from the mandate. In order to found the mandatory in any action against the mandant, he must implement the terms of the mandate specifically; *l. 5. et l. 41. ff. Mandati vel contra. Ersk. l. 3. tit. 3. § 35.* The charger, therefore, is not at liberty to substitute an open accompt in place of the bill, even though it had been equally beneficial to the mandant. But an accompt is not to be held as equivalent to a bill; and it would be a dangerous precedent, in mercantile transactions, if letters of credit were to be so interpreted. A bill affords a more easy and expeditious method of obtaining payment; and therefore it is a deviation to the prejudice of the mandant, if it is neglected to be got when stipulated.

Answered for the charger : The rule of law, that action against the mandant is denied to the mandatory who deviates from the terms of his commission, is not to be understood as applicable to a deviation which is merely so in words, while the substantial purpose of the mandate is truly fulfilled. It is laid down in the law-books that this penal consequence does not follow, where the deviation is immaterial, or where the mandatory did what is equivalent, and no loss whatever can be instructed; *Voet. T. Mandati vel contra, § 11, Bankt. l. 1. tit. 18. § 13.*

In the present case, the terms of the missive prove, that the taking of a bill from Nisbets was not considered as a material circumstance in the conduct of the transaction. The cause of granting the missive is mentioned, in itself, to be the manner in which the parties had conducted themselves under the former credit, where no bill was taken, though it was, in like terms, required in the missive. The bill, likewise, was only to be made payable at such date as Nisbets and the charger could agree upon. So that the charger was not restricted as to the length of time for which he was to give credit to the Nisbets. From these circumstances it appears, that the only object the suspender had in view, was to get a sufficient voucher of the payment. This purpose, an attested accompt, or a decree for payment, against the Nisbets, would answer as well as a bill. The bill was a stipulation in favour of the charger, as affording him a better security than an open accompt; and a mandatory may, in every case, depart from stipulations in his own favour.

In this case, the suspender likewise insisted, that he had, *de facto*, suffered a loss by the want of this bill, and might have recovered the money from James Nisbet, if the bill had been taken. But this averment was not proved; and the court determined the cause on the general ground, that, where a bill is stipulated to be taken by the mandatory,

datory, and he does not get a bill, but allows the furnishing to lie over on an open accompt, the mandate is not executed with that strictness which the law requires. The judgment was,

‘ Suspend the letters *simpliciter*. ’

Lord Ordinary, *Stonefield*.

Aff. *Bruce*.

Alt. *Corbet*.

Clerk, *Menzies*.

No. LII.

January 13. 1779.

J O H N A N D E R S O N,

Against

The K I R K-S E S S I O N of Kirkwall and J O H N R E D-
F O R D.

Offices of Precentor and Session-clerk not for life.

J O H N A N D E R S O N was appointed by the kirk-session of Kirkwall their clerk and precentor, in place of John Redford, who had removed to another part of the country. Redford having soon after returned, the kirk-session dismissed Anderson from the offices of clerk and precentor, and reinstated Redford. Anderson brought a reduction of Redford's appointment, and declarator of his own right to hold both offices, in which he called the kirk-session and Redford.

Pleaded for the pursuer: A person holding a public office is presumed to hold it *ad vitam aut culpam*, if there is nothing in his commission to the contrary, and usage has not established a different rule. On this ground, it has been found, that a school-master in a royal borough is not removable arbitrarily, at the pleasure of the magistrates, though his act of admission did not bear during life; Magistrates of Montrose against Strahan 1710, Fountainhall; Fowles, 10th November 1747, Falconer. The offices of precentor and session-clerk are public offices; they are part of the ecclesiastical polity, and the office of session-clerk is likewise of importance to the community, as furnishing the records of marriages and baptisms.

Answered for the defenders: A commission for holding an office, whether public or private, must, like every other mandate, be considered as revocable at pleasure, unless the contrary be expressed. In some cases, public offices are held *ad vitam aut culpam*, either from the long usage, or the express terms of their commission. Many others are held during pleasure only; but the offices of session-clerk and precentor are not to be considered as public offices. That of schoolmaster is established

established by statute, and a fund appointed for the support of those who hold it; session-clerks and precentors are neither established, nor provided for by law. A kirk-session may have a clerk or not as they incline; and he is merely the private servant of the session.

The court found, ' That the pursuer held the offices of precentor and session-clerk of Kirkwall during pleasure, and therefore affoizied the defenders from the reduction.'

Lord Ordinary, *Braxfield.* Aft. *Stewart.* Alt. *Honeyman.* Clerk, *Menzies.*

No. LIII.

January 14. 1779.

R O D E R I C K M' L E O D,

Against

C O L I N C R I C H T O N.

Virtual assignation of a draught by a bill and protest.

WILLIAM SEED merchant in Belfast, remitted to Sir William Forbes and Co. bankers in Edinburgh, a draught, of 27th April 1776, on Robert Rodger, for L. 120, payable at three months date. This draught was received by the company 3d May, and, on payment of it, 1st August 1776, credit was given to Seed in their books for a balance of L. 90 remaining due by the company to him. Seed became bankrupt, and Sir William Forbes and Co. having brought a multiple-poining, a competition ensued betwixt two of Seed's creditors, Roderick M'Leod and Colin Crichton, for this fund in the hands of the company.

Crichton produced as his interest Seed's draught of 16th March 1776 in his favour, on Sir William Forbes and Co. for L. 137, value in accompt, payable at 41 days sight; which draught had been presented at the house of the company on 27th March, and protested for not payment 10th May 1776.

Colin M'Leod founded on a bill of 3d April 1776, accepted by Seed to Norman M'Leod for L. 100, payable 30 days after date, ' at the house of Sir William Forbes and Co.' This bill was indorsed by Norman to Colin M'Leod, and by him protested for not payment, at the house of the company 8th May 1776. M'Leod likewise brought a process for payment against Seed, having first used arrestment *ad fundandam iurisdictionem*; and, on the dependence of this process, again

gain arrested in the hands of Sir William Forbes and Co. 15th October 1776; and afterwards obtained decree for payment against Seed. Upon this interest,

Pleaded for M'Leod : 1mo, That, although he had no draught directly on Sir William Forbes and Co. it was sufficient authority for them to pay the bill, that it was made payable at their House. The bill was equivalent to an assignation; and, as the protest on this bill, 8th May, was prior to that on Crichton's bill, 10th May, it is preferable on any money then due by the company to Seed, as being first intimated.

But, *2do*, In May 1776, when both protests were taken, the company had none of Seed's money in their hands. They had only his draught on Rodger, payable in August, which being clearly a *nomen debitoris*, is not conveyed under the implied assignation of a bill and protest. A bill of exchange is a mandate to pay *money* to the holder, but nothing else. Had there been a formal assignation to money in the company's hands duly intimated, it would not have carried moveable effects, bills, or other *nomina debitorum* in their possession at the time. The draught, which is only an implied assignation to money, cannot carry what an express assignation would not reach to.

This doctrine has been already established in the case of the *ipfa corpora* of moveables, by a decision of the court, Stewart *contra* Ewing, June 15. 1744, *Kilk.* The principle of that decision applies to the present case; for *nomina debitorum* are no more cash than moveable effects. There was not, therefore, any *lien* created by Crichton's bill and protest over the draught payable by Rodger to the company. This draught continued liable to be attached by the diligence of creditors, which, when used, became a *medium impeditum*, effectually barring any claim by Crichton upon his bill and protest as a mandate to pay. The arrestment, therefore, used on Seed's bill to Norman M'Leod, after the money had come into the hands of the company, carries these funds in preference to Crichton's bill and protest.

Pleaded for Crichton : 1mo, In this case, there can be no competition betwixt the two protests, as there was no draught on Sir William Forbes and Co. except that in favour of Crichton. The draught in favour of M'Leod, is drawn by Seed upon himself, and the house of the company is only mentioned in the draught, as the place at which it is payable by Seed. This was no authority for them to pay. Had they done so, it would have been at their own risk.

2do, Whatever may be the case as to the *ipfa corpora* of moveables, it has ever been found that a *nomen debitoris*, which is a debt of money, does not fall within the assignation implied from a bill and protest. Bills, in particular, are considered by the law as cash; and, therefore, as Rodger's accepted bill was in the possession of the company at the time the protest was taken by Crichton, it was the same as so much cash in their hands. Crichton could have obliged them, in virtue of the assignation implied from his bill and protest, to have indorsed to him the bill on Rodgers, which they held. Although it continued to remain in the hands of the company until paid up, it was only retained

by them for behoof of Crichton. After his protest, they were not at liberty to indorse it to any person ; and they could apply the money to no purpose but that of his payment. An arrestment, therefore, used in the hands of the company, by a creditor of Seed, whether previous or subsequent to the payment of the remittance, if posterior to the protest on Crichton's bill, could not have competed with it.

The court were of opinion, That the protest taken by M'Leod on the 8th May could not compete with that taken by Crichton on the 10th May, as Seed's draught in favour of M'Leod was not directly upon the house of Sir William Forbes and Co. On the second point, they were of opinion, that Seed's draught, in favour of Crichton, on the company, implied a conveyance of his bill on Rodgers in their hands. And it was said on the bench, That any *nomen debiti* may be assigned in this way ; that the company could have been obliged to indorse the bill to Crichton after the protest taken by him, and were only to be considered as holding it for his behoof.

The judgment was,

- ' Find that Colin Crichton is, in virtue of his bill, drawn by the
- ' common debtor, on Sir William Forbes and Co. and protest
- ' thereof for not acceptance, preferable to the sums in the hands
- ' of the company.'

Lord Ordinary, *Elliock.* Aft. *Swinton.* Alt. *Ilay Campbell.* Clerk, *Menzies.*

No. LIV.

January 14. 1779-

Sir ARCHIBALD HOPE,

Against

ANDREW WAUCHOPE.

An opus manufactum, on an inferior tenement, by the proprietor, to prevent the water of a superior tenement from flowing down upon it, how far legal?

THE lessee of Niddery-coal, in working it, left a wall of a certain breadth, stipulated by the lease, betwixt it and the coal of Woolmet, which is a continuation of the same seam, but lies higher than that of Niddery. The coal of this wall being of a porous nature, the water which came down from the coal of Woolmet pierced through it, and was carried off by the level of the Niddery-coal, to the sea. Mr Wauchope, proprietor of the Niddery-coal, in order to prevent the water from piercing the wall, caused make *downsetts*, or pits, in the wall, which he was proceeding to fill up with clay, when Sir Archibald Hope,

Hope, lessee of Woolmet-coal, obtained a suspension, which was conjoined with a process, at the instance of Mr Wauchope, against the suspender. In this action, Mr Wauchope supported his claim to fill up these pits on the following grounds.

By the operations of the proprietor in the Woolmet-coal, the natural course of the water was altered, and it was brought down in larger streams upon the Niddery-coal than before these operations took place. A superior heritor on the surface would not be allowed to collect separate rills, flowing down to an inferior tenement, by a cross ditch, into one channel, and thus send the whole, in one body, upon his neighbour's ground. The civil law not only permits the inferior heritor to defend himself in such a case, but gives him an action of damages against the superior heritor; *l. 1. §. 1. De aqua et aq. pl. arc. Bank. v. 1. p. 682. § 30.*

It will not entitle a superior heritor to alter or increase a natural servitude, that the inferior heritor cannot qualify damage thereby, or that he may easily prevent the damage. If the servitude is altered or increased, the obligation on the inferior heritor to submit to it is removed, and he is entitled to make such *opus manufactum* as the present, on his own grounds, to counteract the effect of the operations made on the superior tenement.

Answered for the defender: In working the coal of Woolmet, the defender carried on no operations but what are usual in working coal. The Niddery-coal being the inferior tenement, was subject to a natural servitude of receiving the water that came down from the coal of Woolmet; and these operations did not bring down the water of any other coal upon it. They had no other effect than to reduce the water into fewer channels than would otherwise have been the case. It is nothing more than what happens frequently on the surface. A superior heritor, in cultivating his lands, makes small ditches or furrows, by which means the water becomes more collected, and discharges itself somewhat differently from what it did before. This does not come up to what the law considers to be an *opus manufactum*, for changing the natural course of the water, or increasing its quantity. The inferior heritor would not be allowed, on this pretence, to erect an *opus manufactum* on his property, to make the water regorge on the superior tenement.

Even when the *opus manufactum* was a real benefit to the inferior heritor, the court have ordained it to be removed; Earl of Eglinton *contra* Fairly, January 27. 1744.

In the present case, Mr Wauchope can suffer no damage from the water passing through the Niddery-coal, as the level is more than sufficient to carry off all the water that comes into it, either from Niddery or Woolmet. This operation, therefore, must be considered as merely in *æmulationem vicini*, and on purpose to overflow the coal of Woolmet. On that account it ought not to be permitted.

The court found, ' That Mr Wauchope of Niddery cannot make the
' downsetts complained of by Sir Archibald Hope, upon any of
' the seams of coal within the lands of Niddery, so as to prevent
' the natural passage of the water through the seams, in its pre-
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‘ sent course, and thereby occasion a reflux or stagnation of the
 ‘ water upon the property and coal of the superior lands of Ed-
 ‘ monston and Woolmet.

But, upon advising a reclaiming petition and answers, the court found,

‘ That the petitioner, Andrew Wauchope of Niddery, is enti-
 ‘ tled to make downsetts in the seams of coal upon his own
 ‘ ground, and to fill up the same with clay, stone, or other
 ‘ materials, so as to effectually prevent the water of Edmon-
 ‘ ston and Woolmet from coming down upon his coal.’

Lord Ordinary, *Kennet.* Añ. *D. Rae, Hay Campbell, M^r Laurin.* Alt. *Blair.*
 Clerk, *Menzies.*

No. LV.

January 15. 1779.

J O H N G R A N T.

Against

R O B E R T D O N A L D S O N.

Sanctuary.

JOHNGRANT, writer in Edinburgh, retired to the Abbey of Holyroodhouse, on 21st April 1778, for protection from personal diligence raised against him at the instance of Robert Donaldson writer to the signet. Having neglected to enter his name in the Abbey-books, he was apprehended within the sanctuary 7th May thereafter, on Mr Donaldson's caption, and carried instantly to jail, but liberated that day, upon making consignation of the money for which the charge had been given. Mr Grant, after his liberation, presented a complaint to the court of session, against Mr Donaldson, and the messenger who executed the caption, praying the court to find that their proceedings were illegal and oppressive, to inflict censure on them, and to give the complainer a suitable reparation for the injury.

Pleaded in defence : At the time this caption was executed, the complainer was not entitled to be protected against diligence, though within the precincts of the sanctuary, as he had not entered his name in the Abbey-books.—The place itself is, by the custom of the Abbey, a protection for 24 hours to the person retiring within its precincts, that he may have sufficient time to get himself booked ; but, in order to continue any longer under the protection of the sanctuary, booking is as necessary as being locally within the bounds of it.

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This is established by immemorial usage ; and it likewise appears from the regulations of the place. The acts of the bailie-court of the Abbey, in 1686 and 1697, discharge the inhabitants from receiving any person into their houses until they cause an entry of their names and designations to be made in a book kept by the bailie, under pain of being subjected to certain fines. In 1733, there was an act of the bailie-court, declaring, that the not booking should be a forfeiture of the privilege. This act, with other records of the court for that year, is now lost. But, in the case of Hamilton of Redhouse, 1741, it was founded on by both parties as a regulation then subsisting.

The constant usage has been, that all persons retiring to the Abbey for protection, have entered themselves in the books. Seven hundred and sixteen persons have been booked since 1741. In the above case of Hamilton of Redhouse, 12th June 1741, the court expressly found, that booking was a necessary requisite to the privilege of the sanctuary.

Answered for the complainer : The privilege of sanctuary within the bounds of the Abbey, which antiently, in this country, extended to felons, still subsists as a protection against personal diligence on civil debt. To this extent the privilege continues annexed to the place ; and nothing less than an act of the legislature could authorise the execution of personal diligence within the precincts of the sanctuary.

The bailie of the Abbey has jurisdiction to regulate its internal police ; and, on that account, may have powers to make regulations for the purpose of obliging those who live within the precincts to enter their names in his book, and pay his fee, under the penalty of a small fine. The acts of the bailie-court, 1686 and 1697, are of this kind. But a regulation, denying the privilege of the sanctuary itself, as a penalty for not being entered in his books, is certainly beyond his powers. The regulation 1733, therefore, was unwarrantable. It has never been renewed ; which shows that the bailies themselves have considered it as illegal.

The usage does not aid the defender's doctrine. The number of persons booked proves only that the bailies have been attentive to exact their fees, and enforce the regulations against the inhabitants. But no instance can be produced, where the diligence has been executed within the Abbey, against persons not booked, except in the case of Hamilton.

Even where the law does not allow the sanctuary to be a protection, no person can be taken out of it, without the knowledge and concurrence of the bailie. This is expressly established by the regulation of the Abbey-court, 1757, which bears, 'That, conform to a nient custom, as well as late practice, the constables of the Abbey oppose every officer of the law from taking any person out of the Abbey, for debt, or even for bailable crimes, without a signed order from the bailie.' Some exceptions are mentioned in this act, within which the present case does not fall. The complainer was taken out of the sanctuary without any order or concurrence of the bailie ; and, in this respect, his case differs materially from that of Hamilton, in which the judgment expressly mentions that the bailie concurred.

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The judgment of the court was,

‘ Find that, when a messenger executes a caption within the precincts of the Abbey of Holyroodhouse, it is necessary to have the previous concurrence of the bailie of the Abbey to that effect. Further, Find that, in order to entitle a person to the benefit of the sanctuary, it is necessary to be booked in the Abbey-books. And, upon the whole circumstances of this case, and the former practice, find that the respondent, in executing the caption against the complainer, acted *bona fide*; therefore dismisses the complaint.’ &c.

Lord Ordinary, *Kennet.* Act, *Honeyman.* Alt. *Elphinston.* Clerk, *Tait.*

No. LVI.

January 19. 1779.

D U N C A N C L A R K,

Against

D A V I D R O S S.

Writ.

WALTER ROSS purchased in Scotland, and shipped for London, two cargoes of coals, upon commission, for Duncan Clark and George Ross, who carried on a coal trade in company there. Before the arrival of the vessels at London, Ross and Clark had agreed to dissolve the company; and Ross being desirous to have the property of both cargoes, Clark consented, on condition of his getting sufficient security, that he should not be liable for any part of the price.

George Ross accordingly prevailed on David Ross to interpose, by a missive to Clark, in these terms: ‘ As my friend Mr Walter Ross writes has gone under acceptance to John Grieve of Borrowstounness for two cargoes of coals, value about L. 111, which was shipped at Borrowstounness in October last, on account of George Ross, for George Ross and company, I hereby become bound to you, that you shall not be called upon for the payment of any of the above cargoes of coals; or, if you should be called upon, I oblige myself, by this letter, to relieve you from any demands that can be made upon you on account of said coals,’ &c.

The missive was wrote by George Ross, and subscribed by David. George afterwards became bankrupt; and Walter Ross having brought an action against Clark for the price of the coals, Clark pursued David Ross

Rofs for relief upon his missive, who acknowledged his subscription, but objected, that the missive was null, as wanting the statutory solemnities.

Pleaded for the pursuers : The missive in question being executed in England, its validity cannot be affected on account of the want of forms merely required by a Scottish statute. It is valid, if conceived in a form agreeable to the law of the *locus contractus*. Missives of this kind are obligatory in England, and are common and necessary in expediting the operations of trade.

But, were the law of this country to be the rule, the transaction in this case was of a mercantile nature; and it is a fixed point, that a missive, such as the present, *in re mercatoria*, is probative and obligatory.—And even although it were not *in re mercatoria*, the objection to the missive is removed by the defender's acknowledgment of his subscription. This is sufficient to render the missive probative; and so it has been found in cases where the transaction was in no degree mercantile; Foggo against Milliken, 15th December 1746, Kilk. Crawford against White, 13th January 1739; Niel against Andrew, 8th June 1748.

Answered for the defender : The pursuer cannot found an argument on the *locus contractus*, as he has not established, by any authority, that cautionry obligations may be executed by the law of England in the form of this missive. If it is null and void by the laws of this country, it will not be presumed effectual by the law of England. The presumption is, that objections of a like nature would occur to it in the courts of that country as occur to it here.

By the law of Scotland, the missive in question is not probative nor obligatory. A certain indulgence with respect to forms is allowed in mercantile transactions which require dispatch. But a cautionry obligation is one of those deeds which comes directly under the intendment of the act 1681, and requires the solemnities mentioned in that statute to render it effectual.—Cautioners have been affoizied from actions founded on imperfect deeds, even before the act 1681, where the principals in such deeds have been held as expressly bound; * June ult. 1625, Durie; Campbell against Campbell 1664, Gilmore.

It will not remove this objection to the writing, that the defender does not deny his subscription. The object of the statute is not merely to prevent the forgery of a subscription; it was meant, that deeds to which these solemnities are requisite, should be executed in a deliberate manner, and before witnesses, whereby fraudulent designs might be prevented, or at least afterwards brought to light. The objection, therefore, remains, though the subscription is not denied; and this doctrine is supported by the latest judgments of the court; M'Kenzie against Park, 15th November 1764; Crichton and Dow against Syme, 22d July 1772.

The Lord Ordinary pronounced the following interlocutor: 'As it stands acknowledged on the part of the defender, that the subscription to said letter is his true subscription, repels the defence pleaded against said letter, as neither probative nor obligatory, in respect of
' its

* The names of the parties are not mentioned in the decision.

‘ its not being holograph, nor having any of the solemnities required
 ‘ by the statute 1681. Finds, that, as the letter is dated at London,
 ‘ where both pursuer and defender did reside at the time, and as it
 ‘ stands confessed, that the subscription to said letter is the defen-
 ‘ der’s true subscription, finds, that the statute is out of the case. And,
 ‘ *separatim*, finds, that, supposing the statute to apply, the defender’s
 ‘ acknowledgment of the subscription to said letter being his true
 ‘ subscription, is available to render said letter both probative and obli-
 ‘ gatory ; and, therefore, upon both these grounds, finds the defen-
 ‘ der liable to relieve the pursuer of the two bills referred to in said
 ‘ letter.’

The court ‘ adhered to this interlocutor’ on advising a reclaiming pe-
 tition and answers.

Lord Ordinary, *Covington.* Act. *W. Stewart.* Alt. *Crosbie.* Clerk, *Menzies.*

No. LVII.

January 19. 1779.

JAMES STEWART,

Against

JAMES MORRISON.

Case of a concealment on the part of the insured.

JAMES MORRISON in Leith freighted the ship the Three Brothers from Andrew Morrison, for a voyage from the Frith of Forth to Koningsberg, there to take in a lading of wheat for the Frith. The vessel arrived at Koningsberg on 29th August 1774. Mrs Barclay, who had the charge of loading the vessel, wrote to James Morrison 6th September, that she had purchased the wheat, adding, ‘ The whole, I expect, will be ready to ship to-morrow, so that you may now take your measures with regard to the insurance.

On the 13th September, she again wrote to James Morrison : ‘ I have herewith the pleasure to cover your bill of loading and invoice of 39 bolls last wheat, shipped for your account *per* the Three Brothers, Captain John Maul. *Captain Maul is now quite ready to depart with first fair wind.*

This letter was received by James Morrison on the 30th September, and next day he wrote to Andrew Morrison informing him of the contents of it. On the 5th October Andrew Morrison wrote to James to insure L. 200 for him upon the ship at 3 *per sent.* or lower, if possible,

ble. James, accordingly, on the 7th October, wrote to an insurance-broker at Edinburgh to get this insurance done ; and added, ‘ *The vessel was expected to be loaded at Koningsberg betwixt the 13th and 20th September.*’ On the same day the insurance was got done at 2 1-half per cent. James Stewart and others having underwrote the policy, which is declared to be ‘ upon the Three Brothers, at and from Koningsberg ;’ and subjoined to the policy, are the words of the letter ; ‘ *said ship expected to be loaded,*’ &c.

On the 7th October likewise, Ellis Martine, at the desire of James Morrison, wrote to another insurance-broker at Edinburgh, to get insured on account of James Morrison, L. 150 on goods by the Three Brothers ; ‘ the ship warranted safe the 13th ultimo, and no advice of her failing.’ On the 8th October, this policy was underwrote by Stewart and the same persons who had underwrote the former ; and the policy bears, ‘ that the ship was warranted safe 13th ult.’ &c.

This vessel failed from Pillaw, the port of Koningsberg, on 13th September, but run ashore on the island of Rugen two days after, and was there totally lost.—A demand was made on the insurers by James and Andrew Morrison, upon which the insurers brought an action before the admiral-court for setting aside both policies, on this ground, that there had been an undue concealment from them of the advices received by Messrs Morrison, previous to their making the insurances. The admiral foilzied the defenders, and the cause was brought into court by a reduction of the admiral’s decree, at the instance of the insurers.

Pleaded for the pursuers : The principles of mercantile law on which this question depends, are stated as follows, in a case reported by Sir James Burrow, p. 1909, *Cater versus Bochen*, 12th May 1766. ‘ Insurance is a contract upon speculation ; the special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence, that he does not keep back any circumstance in his knowledge to mislead the underwriters into a belief, that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist.

‘ The keeping back such circumstance is a fraud ; and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void ; because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

‘ The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract, which the one privately knows, and the other is ignorant of, and has no reason to suspect. The question, therefore, must always be, “ Whether there was, under all the circumstances, at the time the policy was underwritten, a fair representation, or a concealment, fraudulent, if designed, or though not designed, varying materially the object of the policy,

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“ and changing the risk understood to be run ?” Sir William Blackston states the same general doctrine, B. 2. c. 30. § 3.

In the present case, there was a concealment on the part of the insured, of a circumstance, in their knowledge, which affected the object of the policy, and changed the risk. The information given to the broker for insuring the ship, and on which the policy was entered into, mentioned only that the ship was ‘ safe on the 13th, and no advice of ‘ her sailing.’ A material circumstance was concealed, which the defenders were in the knowledge of, by their letters from Koningsberg, —that the ship was compleatly loaded on the 11th, and ready to sail on the 13th with the first fair wind.

The information given by James Morrison in his letter to the broker, on making the other insurance, is still more fallacious; for he says, ‘ The vessel was expected to load betwixt the 13th and 20th September.’ This tended to mislead the insurers, by lessening their idea of the risk; for, if the fact had been spoke out according to Morrison’s advices, that the vessel was compleatly loaded on the 11th, and ready to sail on the 13th, she must have been considered as a missing ship on the 7th October, as in the ordinary course of the voyage she ought to have arrived sooner. The defenders would not have insured her at all, or would have demanded a hazardous insurance. But, as Morrison’s letter imported, that the vessel had her cargo to take in betwixt the 13th and the 20th, and consequently that she was not to sail sooner than the 20th, according to his information, she was not to be considered as a missing ship.

From these circumstances there is reason to think, that this concealment was designed; but, upon the principles above-mentioned, it makes no difference as to the merits of this question, whether the concealment was designed and fraudulent, or proceeded from mistake. As the concealment was material in estimating the risk, the policy must be set aside.

Answered for the defenders: The circumstance said to be concealed is immaterial, and did not vary the risk to the insurers. When the insured is in the knowledge that the ship had sailed on a certain day, and conceals it from the insurer, there may be some reason for considering the ship as missing, if she remains out even for a few days after the time in which the voyage is commonly performed. But, in the present case, the defenders had not information on what day the ship sailed; and they knew no more than that she was ready to sail on the 13th. The time of her sailing was a matter of some uncertainty, depending on the winds and tides. Supposing the defenders, therefore, to have given their information to the insurers in the express words of the letter, the vessel could not have been accounted a missing ship, though remaining out a few days longer than she ought, if she had sailed precisely on the 13th;—consequently nothing more than the ordinary insurance would have been demanded.

But the letters to the brokers, and the terms of the policy, did, in this case, import all that the defenders knew, material or immaterial; and it is sufficient that the substance of the information is given; for it is not necessary to produce the correspondence.

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In one of the policies, ' The ship is warranted safe on the 13th September.' This, in mercantile language, implied, that the insurers were to take the risk of the ship from that day. It was supposed in the policy she was to sail on the 13th; and the expression was the same, though in fewer words, as if the insured had told that she had taken in her cargo, had cleared at the custom-house, and was ready to sail. To the insurers in this policy, therefore, full information was given.

The Lord Ordinary pronounced the following interlocutor: ' The Lord Ordinary having considered the mutual memorials, &c. is of opinion, that the person who applies for insurance of a ship or cargo, in foreign parts, is not bound to produce or communicate all his letters of intelligence concerning the voyage or adventure; yet he is bound fully and fairly to communicate every material circumstance of his intelligence from which any probability of hazard may arise. The Lord Ordinary is also of opinion, that, in this case, the insured have either wilfully concealed, or inadvertently omitted very material circumstances of the hazard in their informations to the insurers. In one of the policies, dated 8th October, the ship is warranted safe on the 13th September, and no advice of her sailing. But these material circumstances of intelligence are suppressed or omitted, viz. that the ship had been completely loaded between the 6th and the 13th; that she was then ready to sail, and the bill of loading and invoices were transmitted; and the insured's information, on the other policy, dated 7th October, is still more exceptionable, as it intimates to the insurer that the ship was only expected to be loaded betwixt the 13th and 20th September, though the insured had positive intelligence that she was actually loaded, as above, betwixt the 6th and 13th; and that the master, after delivering his bill of loading and invoices, was then ready to sail with the first fair wind, and, in fact, she did sail on that very day: Upon these grounds, the Lord Ordinary finds the insurance void; and decerns and declares accordingly.' And to this interlocutor the court adhered, upon advising a reclaiming petition and answers.

Lord Ordinary, *Gardenston.*

A&A. *Ilay Campbell.*

Alt. *Crosbie.*

Clerk, *Tait.*

No.

No. LVIII.

January 23. 1779.

ALEXANDER MELVIL,

Against

JAMES BARCLAY.

(N. B. The court ordered the following state of the question betwixt these parties, with their judgment upon it, to be inserted in the books of federunt.)

‘ IN a competition among the arresting creditors of a bankrupt tenant, upon the price of his effects, which had been *sold by authority of the sheriff*, a question having occurred, How far the wages due to the farm-servants of a bankrupt tenant, for the term current at the bankruptcy, were to be considered as privileged debts, and preferable to arresters? the Lords, before answer, ordained an inquiry to be made into the practice of the sheriffs of the different counties of Scotland as to that point. And reports having been accordingly received of said practice, from the sheriffs of Edinburgh, East Lothian, Perth, Air, Aberdeen, Lanark, Roxburgh, Renfrew, Dunbarton, Dumfries, Selkirk, Ross, and Kincardine, the Lords yesterday proceeded to take the same into consideration, and thereafter pronounced an interlocutor, Finding, that the wages due to the servants of a bankrupt tenant, that is, to the servants *kept for the purposes of the farm*, are privileged debts on the price of the bankrupt's effects, and are preferable to arresters.’

No. LIX.

January 26. 1779.

PATRICK BROWN,

Against

SAMUEL BROWN.

Heritable and moveable.

WILLIAM CATHCART granted an heritable bond over his lands to Dr Brown, for security of a debt previously due to him. Dr Brown, who resided at Kingston, executed a power of
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of attorney to Messrs Blackburn and Barclay, authorising them to obtain him infest on this heritable bond, and ' to act and do all other things ' relative to the premisses, as if he were personally present.' Infestment was accordingly taken in his name by his attornies.

About this time, several adjudications were led against Cathcart's subjects by his other creditors; and, in order to prevent the expence of a judicial sale, the creditors agreed upon an application to the debtor, to name commissioners, with powers to sell the lands, and divide the price among the creditors *pari passu*.

A commission was accordingly executed by Cathcart, and the commissioners under it were empowered to sell the lands, and grant dispositions in the name of Cathcart to the purchasers, which were declared to be ' sufficient security to them.' After part of the lands were sold, the creditors, in a deed executed betwixt them and the trustees, ratified the commission and sales, with this proviso, ' that the produce arising ' from the sales should be divided equally among the creditors, according to the extent of their debts.' The attornies for Dr Brown joined in the original application, and were parties to this deed.

Dr Brown survived the sale of these subjects, but died in Jamaica before any payment was made.—By his will he left his whole personal estate to Mr Blackburn, who conveyed all right he had to it under the will, in favour of Patrick Brown, in consequence of a transaction betwixt them.

In a multiple-pounding brought by the purchasers of Cathcart's subjects, a competition arose betwixt Patrick Brown claiming under the will, and Samuel Brown, the heir of conquest to Dr Brown, which of them had right to the part of the price corresponding to the Doctor's debt. The issue of this competition depended on the question, whether the debt was heritable or moveable at the time of the Doctor's death? For, if heritable, it went to the heir of conquest, all Dr Brown's fortune having been of his own acquisition; but, if moveable, it went to Patrick Brown, who had a right to the moveable effects.

Pleaded for Patrick Brown: Though the debt due to Dr Brown was at one time heritably secured, this security was given up, and the debt became moveable by the transaction for bringing on a voluntary sale of the estate. Dr Brown, acting by his attornies, was a party to the whole of the transaction.

The concert among the creditors to come in *pari passu*, and the powers given to the commissioners to draw the price of the lands, as well as to sell them, and to give sufficient dispositions to the purchasers, necessarily import, that the heritable securities were entirely departed from. The right of every creditor, after the commission, resolved into a personal claim against the commissioners for a proportion of the price corresponding to his debt *pari passu* with the other creditors.

Pleaded for the heir of conquest: The attornies had no powers from Dr Brown to alter the nature of his debt from heritable to moveable. Their powers went no farther than to complete the security of the heritable bond by infestment.

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But no such alteration on the debt was agreed to by the attornies. The transaction only imported, that Dr Brown should restrict his claim as to any preference he might be entitled to, and come in *pari passu* with the other heritable creditors. It was not stipulated that he should depart from his infestment as an heritable security for his share of the price. The transaction does not go that length; and the lands could not have been disburdened of the heritable security upon them by any disposition from the trustees to the purchasers, nor until Dr Brown's share of the price was paid up to him. He was in the same situation, in this respect, as if the lands had been sold at a judicial sale, where the heritable securities continue on the lands until the price is paid to the creditors.

The court were of opinion, That the attornies of Dr Brown had not sufficient authority from their commission to change the nature of the debt from heritable to moveable; and likewise, that the transaction did not import, that the heritable security was to be given up.

The court found, ' That the share of the price of Mr Cathcart's
' lands, in the hands of the purchasers, the raisers of the mul-
' tiple-pounding, effeiring to the annualrents due in Dr Brown's
' heritable bond, at the time of his death, is *moveable*, and falls
' to the Doctor's *executors*; but that the share of the price, effeir-
' ing to the principal sum in said bond, is heritable, and falls to
' his heir of conquest.'

Lord Ordinary, *Hailes.* A.C. *Armstrong.* Alt. *Crosbie.* Clerk, *Tait.*

No. LX.

January 28. 1779.

M I C H A E L L A D E,

Against

R O B E R T S C O T T.

Onus probandi.

SOPHIA, Lady Cranston, in her marriage-contract with Lord Cranston, was provided in a jointure of L. 700; in security of which she was infest in his Lordship's estate of Crailing.

This estate being brought to a judicial sale by his creditors, was purchased by Robert and Walter Scott, and the purchasers were entitled to retain a considerable part of the price to answer the jointure.

Lady

Lady Cranston survived her husband, and was afterwards married to Michael Lade, Esq.

The postponed creditors of Lord Cranston used diligence in the hands of the purchasers of the estate, who brought a multiple-poinding, upon which a litigation ensued as to the effect of a renunciation granted by Lady Cranston of her jointure. In the end she and her husband prevailed, and the court preferred him, as in the right of his wife, to the interest of the retained sums, for payment to him of the annuity then due, 'and in time coming during the life of Lady Cranston.' In consequence of this judgment, the bygone annuities were paid up by the purchasers; but they refused to make any further payment of Lady Cranston's annuity to Mr Lade, unless either Lady Cranston should join in the receipt, or Mr Lade should, along with each discharge, produce a certificate from a justice of peace, certifying Lady Cranston to be still alive, and that he knew her to be Lady Cranston, the widow of Lord Cranston.

Pleaded for Mr Lade: That his marriage with Lady Cranston being a legal assignation to him of this annuity, a discharge, or receipt, from him, is all that the purchasers can demand. Every person who is in possession of a right, the endurance of which depends upon his own life, or that of another, is entitled to the benefit of the legal presumption in favour of life. The *onus probandi* lies upon those who affirm that such right is expired. This is exemplified by Lord Bankton, in the case of a liferenter of lands, assigning his liferent and going abroad, 'The assignee is entitled to continue in the possession by virtue of the liferent, unless the liferenter's death is proved, or that he should be 100 years old; till which term the presumption for life takes place;' B. 2. t. 6. § 31. And so it was decided in the case of Carstairs against Stewart, 30th July 1734, Dict. v. 2. p. 163.

Mr Lade is as fully in possession of this annuity as the nature of it will admit. The purchasers have actually made payments to him, and he has drawn the whole of the annuity since its commencement till now. He is not, therefore, bound to produce any evidence of Lady Cranston's being in life. This will hold, at least, until the purchasers shall show they have some reason for suspecting that she is dead.

Answered for the purchasers: In every case, a person who is in *petitorio* must support, by evidence, the fact on which his claim is founded. There is no exception from this rule in the case of a claim depending on the fact, that a person is alive. The legal presumption in favour of life, operates only where a party is in *possessorio*. This was the ground of the judgment in the decision Carstairs against Stewart, where an assignee, under a liferentrix, was in possession of lands, out of which the proprietor attempted to remove him. The assignee admitted, 'That, were he insisting for possession, he must prove his libel, viz. the existence of the liferentrix.'

The purchasers are in possession of the whole of Lord Cranston's estate; Mr Lade is merely in *petitorio*, and cannot obtain payment of the annuity without claiming it from the purchasers. The *onus probandi*, therefore, lies on the assignee, and he must prove the fact, that
Lady

Lady Cranston is in life, either by getting her subscription to the discharge, or by the certificate proposed.

It does not alter the case that Mr Lade has already received payment of bygone annuities, without being required to produce such evidence. It is no doubt optional to the purchasers to dispense with this evidence, if they choose.

The court, by their last interlocutor, ' found, that Mr Lade is entitled to uplift the annuities in question during Lady Cranston's life, upon his own discharges, without producing any certificates of her being in life at the terms for which the annuities are payable: reserving to the purchasers to apply to this court by suspension, in the event of Lady Cranston's death, or of their having reasonable cause to suspect or believe her to be dead.

Lord Ordinary, *Auchinleck.* For Lade, *D. Rae, Alex. Elphinston.* Alt. Lord Advocate,
H. Erskine. Clerk, *Campbell.*

No. LXI.

January 28. 1779.

JAMES KEMPT,

Against

GEORGE WATT.

Tailzie. Irritant clause.

JAMES WATT brewer executed an entail of a small subject called Livingston's Yards, belonging to him, on Sarah Watt his second lawful daughter, and a series of heirs in succession. This deed contained a clause in the following terms: ' Providing always, that it shall not be in the power of my said daughter, nor any other of the heirs of tailzie, &c. above mentioned, to contract any debts whereby to burden or affect the houses, yards, and others above disposed, with the pertinents, above the extent of one year's free rent thereof; nor shall it be in the power of, nor lawful to any creditor or creditors of my said daughter, or the other heirs of tailzie, to adjudge or evict the said houses, &c. for such, or any other debt, contracted, or to be contracted by my said daughter, or other heirs of tailzie; but only to have access to, and possess the maills and duties of the said houses, &c. till payment of any debts contracted by her or them; and that to the extent of one free year's rent only, and no further.' The deed likewise contained a prohibition on the heir of entail to sell, and a resolute clause in the usual form. , But there was
no

no clause in it expressly declaring, that all the debts and deeds of the contraveener should be null and void. This deed was recorded in the register of tailzies.

On the death of the entailer, the succession in the subject devolved on James Watt his nephew, who entered into possession, without making up titles. Adjudications were led against the subject, both by the creditors of the entailer, and those of James Watt the heir in possession; and a process of ranking and sale of the subject was brought at the instance of these creditors. George Watt, next heir of entail, having raised a declarator of irritancy against James, appeared in the process of sale, and

Objected: That, by the clause of entail above recited, the subjects in question cannot be attached for the debts of the heir in possession to any greater extent than a year's rent; and, therefore, the debts of James Watt ought not to be taken *in computo* with those of the entailer to render the estate bankrupt and authorise the sale.

Answered for the creditors: As the irritant clause is entirely wanting in the entail of these lands, the entail is ineffectual against purchasers and creditors. The clause on which the defender founds is merely prohibitory.

The irritant clause is distinguished in the statute 1685 from all prohibitory clauses, by these words, in which it is described, 'declaring all such deeds to be in themselves null and void.' It is thus made a separate requisite and condition of the entail. The deeds themselves must, *in terminis*, be declared null, otherwise all prohibitions to grant or receive them are of no use.

It is not enough that the intention of the entailer to render the debt or deed void may be inferred from the prohibitory and resolute clauses. Creditors and purchasers are entitled to have the entail strictly interpreted. Accordingly, it is laid down in the law-books, that an irritant clause is essential to the entail, and, where it is wanting, cannot be reared up against the heir by implication; Stair, b. 2. t. 3. § 58.; Ersk. b. 3. t. 8. § 20.; Bankt. b. 3. t. 3. § 139. On these principles, it has been found, that a prohibition against heirs to contract debt, attended with a clause forfeiting the right of the contraveener, however strongly they may imply the intention of the entailer that the debts shall be null, do not make up for the want of an express irritant clause; Dictionary, vol. 2. p. 432.; Bailie *contra* Carmichael, July 11. 1734; Primrose, 27th January 1724; Kilkerran, (Tailzie.)—These decisions are in point to the present case. Though the prohibition in this entail is directed against the creditors, as well as the heir, forbidding them to attach the estate, the clause is nothing more than prohibitory. It may show more clearly the intention of the entailer; but still, as there is no irritant clause, the entail wants a condition required by the statute to render it effectual against creditors.

Though this prohibition should be considered as equivalent to an irritant clause, it extends only to the case of creditors. A purchaser from the heir in possession would be safe, there being no clause prohibiting persons to buy the lands.—As the maker of the entail, therefore, did not qualify the right so as to deprive the heir in possession of the power of disposing the subject, the entail is not good against cre-

ditors. The heir may, if he choofes, do justice to his creditors, by selling the subjects, and applying the price to their payment. If he will not make a voluntary sale, the creditors are entitled to have the subjects sold judicially.

Replied for George Watt: There is no precise form, or words of style, essential to a clause irritant.—The statute 1685 does not require it. The passage of the statute founded on, is merely descriptive of the nature and import of that clause; but does not tie down the entailer to use the words of the act itself. Lord Stair takes notice of the variety of modes in which irritant clauses may be conceived; B. 4. t. 18. § 10.

The real intendment of the statute is fully answered in this entail, by providing, that it shall not be in the power of the heir ‘to contract any debts whereby to burden or affect’ the subject; and that it shall not be ‘in the power of, nor lawful to any creditor of the heir, to adjudge or evict the said subject, for such, or any other debt contracted, or to be contracted,’ by his daughter, or other heir of tailzie. This is more than a personal injunction on the creditors not to contract with the heir. It is, in effect, declaring, that the debt, if contracted, shall not be good against the estate; which is all that is intended by the statute.

The meaning of the statute is even more accurately expressed than if the debts had been declared null and void; for the purpose of the act is only to make the deed void, *quoad* the entailed estate, and not to annul the deed *in totum*. It remains obligatory on the heir personally, and is valid in every other respect. The words ‘null and void,’ therefore, express more than the intention of the act; and, when actually used in a tailzie, must be restricted to this meaning,—that the deeds to which they apply should not be a ground for *adjudging or evicting the estate*.

The decisions founded on in the cases of Carmichael and Primrose are not applicable; for, in these, there was merely a prohibition on the heir to contract debt; but no clause disabling the creditors from adjudging or evicting the estate. The entailer, in that case, must be considered as resting satisfied with the effect of the resolute clause, to prevent the heir from contracting debt, without meaning to defeat the security and payment of onerous creditors, if debts should, nevertheless, be contracted.

It affords no objection to this entail, when opposed to the claim of creditors, that it does not contain an irritancy of the same kind in the case of a voluntary sale.—The statute makes it lawful to his Majesty’s subjects to tailzie their lands, ‘with such provisions and conditions as they shall think fit,’ and to affect the said tailzies with irritant and resolute clauses, &c. It is thus left optional to the entailer to direct his prohibitions and irritancies against such acts and deeds as he pleases.—The restrictions of the tailzie cannot be extended by implication *de causa in causam*, though they must have their full effect in those cases to which they extend.—An entail may effectually guard against a voluntary sale of the estate, and yet allow the heirs to contract debts upon it: or may effectually bar the contraction of debts, and leave the heirs

at

at liberty to sell. The latter point was determined in the case of Hepburn *contra* the Earl of Hopeton, 1732; and of Sinclair of Carlowie, November 8. 1749.

The court finally found, ' That the deed of settlement and tailzie in
 • question, is no bar to the sale now depending, upon the debts
 • and contractions of James Watt, one of the substitutes in the
 • said entail, and defender in the present sale.'

Lord Ordinary, *Gardenston*.
G. Ferguson.

For Watt, *Rae, Belfries*.
 Clerk, ———.

For Kempt, *J. Campbell*,

No. LXII.

January 29. 1779.

J O H N C R O O K S,

Against

J O H N T A W E S.

Society.

ANDREW PORTEOUS mason, and Robert Young slater, engaged in a joint undertaking of building a tenement of houses, on a spot of ground which they had purchased for that purpose. There was no written contract of copartnery, nor articles of agreement executed betwixt them.

Young died after the building was begun, having appointed Crooks and other trustees for his children, and disposed to them his share of this adventure. The trustees, in order to forward this work, gave their own security to several persons who had debts due to them for materials furnished, or work done at the building.

The subject being finished, part of it was sold.—One tenement was purchased by Mr Bell for L. 212 Sterling; and a half of the money was paid, and applied to extinction of the debts for which the trustees were bound. Mr Bell gave bond for the other half to Porteous and the trustees.

Soon after, Porteous became bankrupt.—A sequestration was awarded against him, and a factor appointed. Mr Bell, in order to pay safely, raised a multiple-pounding, and a competition ensued for the sum in the bond betwixt the factor for the creditors of Porteous, who claimed one half of the bond as due to Porteous, and Young's trustees, who insisted that they had right to the whole sum, to be applied by them in paying off the debts for which they had given security.

Pleaded

Pleaded for the trustees : It is a fixed point, that, in every copartnership, the partners, until the division of the company's subjects is made, are each in possession of the whole *pro indiviso* :—On this account each partner is entitled to retain possession against the other partners, or their creditors, till such time as he is relieved of every engagement he has come under on account of the copartnership. The law makes no distinction, in this respect, betwixt a proper copartnership and a joint adventure. The reason and justice of the rule apply equally to both ; Ersk. B. 3. t. 3. § 29. and it was so found in the case of a joint adventure ; Creditors of M'Caul *contra* Ramsay and Ritchie, 11th January 1740.

In the present case, though there was no contract of copartnership, yet the *res gesta* proves, that there was a joint adventure, and those concerned in it were in a company trade to a certain extent. The persons who furnished materials for the building, or their own work, when not paid, became creditors of the company, and, as such, would have been preferable on the company's funds to the private creditors of the partners. When the trustees, therefore, gave their security to the creditors in these debts for their payment, they were in effect entering into an engagement for behoof of the copartnership ; consequently, on the principles above mentioned, the trustees are entitled, so far as the common stock remains undivided, to pay off those creditors out of it, in order to relieve themselves. The money of this bond must be applied to this purpose in the first place. After the company's debts are cleared, the stock will be divided, and Porteous' share of it will no doubt go to his own private creditors.

Answered for the creditors of Porteous : There was no copartnership betwixt Young and Porteous. The circumstance of their joining in the expence of building the tenement, can go no further than to make it a common property, in which each had a right to an equal share *pro indiviso*.

Common proprietors, if they are not in a copartnership, cannot bind one another. The tradesmen who furnished materials, or worked at the building, have no hypothec on the house, and consequently no body is bound to them excepting their proper employer, and those whom they have taken bound.—They may attach Young's share of the common property like any other private creditor of his ; but they could not adjudge or carry off the share of the other co-proprietor for their payment. As the creditors themselves could only have attached Young's part of the subject, his trustees can have no right to insist, that the share belonging to the other co-proprietor should be applied to relief of the security which the trustees have given to these creditors.

But, although this should be considered as a copartnership *rebus ipsis et factis*, the stock was divided among the partners by the sale of the houses.—The bond for the price is not made payable to Young's trustees and Porteous as in company ; it is due to them each for his own share.—The transaction was the same as if the money had been divided at the time of the sale among the two co-proprietors, and afterwards lent out by them to the purchaser, each for his own behoof, on a separate bond. This, therefore, is not a fund belonging to the company,

company, but the private effects of the partners, and consequently company creditors can have no preference on it.

The court 'found the creditors in debts contracted by the *socii* for
' carrying on the joint adventure for building the houses, are pre-
' ferable on the price of said houses to the creditors in separate
' debts contracted by any of the *socii*.'

Lord Ordinary, *Elliot*.

For Crooks, *H. Erskine*.

Alt. *Miller*.

Clerk, *Orme*.

No. LXIII.

February 3. 1779.

M ' K E N Z I E,

Against

His C R E D I T O R S.

Cessio Bonorum.

M 'KENZIE was, on the 12th November 1778, incarcerated at the instance of Brown, and, on the 13th December, executed a summons of *cessio bonorum* against his creditors, which was called in the course of the roll 28th January.—A few days before the cause came into court, but after the pursuer had been more than two months in prison, the incarcerating creditor intimated to the magistrates a consent to his liberation; and the magistrates mentioned this circumstance in the certificate which they granted of his imprisonment.—When the cause came before the court, no appearance was made for any of the creditors; but it was at first doubted how far the *cessio* could proceed, in respect of the creditor's consent to his liberation.

Pleaded for the pursuer: That, after the debtor has been for the legal time in prison, and his action in court, or even his summons of *cessio* executed, it is not in the power of the incarcerator, by a consent to his liberation, to bar him from proceeding in the action. If he had such a power, the benefit of the *cessio*, instead of depending on a compliance with the requisites of law, might, at all times, be disappointed by the incarcerator, or the bankrupt's other creditors; for there is nothing to prevent any of them from incarcerating the bankrupt anew after his liberation. Thus, he might be kept in a state of constant imprisonment.

The court 'allowed the *cessio* to proceed.'

A^d. *Erskine*.

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No.

No. LXIV.

February 3. 1779.

Sir *L A U R E N C E D U N D A S*,

Against

The OFFICERS of STATE, *HONEYMAN* of Graemsay,
and others.*Jurisdiction. Superior and Vassal.*

THE estates which antiently belonged to the crown in Orkney and Zetland, were granted by Q. Mary to Lord Robert Stuart, her natural brother. The charter conveys 'totas et integras terras de Orkney,' &c. *cum tota superioritate libere tenentium*.

In 1581, this grant was confirmed by a new charter, in the same terms, and by which the subjects conveyed were erected into the Earldom of Orkney and Lordship of Zetland.

The whole of the estates having returned to the crown by the forfeiture of Patrick Earl of Orkney, son to Robert, were annexed by an act of Parliament, in 1612.

In 1643, William Earl of Morton obtained a wadset of the earldom and lordship from the crown, redeemable on payment of L. 30,000, alledged in the grant to have been applied to his Majesty's use. The subjects are conveyed, '*una cum superioritate omnium et singulorum hæreditariorum vassalorum dict. comitatus, domini*,' &c. An act of parliament followed, dissolving the earldom, &c. from the crown, and confirming the charter. But this grant, and a subsequent wadset of the estates in favour of a trustee for the family of Morton, were both set aside by the court of session in an action at the instance of the crown, and the earldom, in 1669, was of new annexed to the crown.

In 1707, an act passed in the parliament of Scotland, dissolving from the crown this earldom and lordship, together with 'all parts and pertinents, casualties, jurisdictions, privileges, and others whatsoever belonging to the same,' to the effect, that her Majesty may dispoise to James Earl of Morton, the foresaid earldom, &c. 'jurisdictions, casualties, and others above mentioned.' This statute reserves a right of redemption to the crown on payment of L. 30,000.

In pursuance of the act, a signature was obtained from the Queen, and a charter passed, of the earldom of Orkney, &c. in favour of the Earl of Morton, in which there was a clause, disponing to the Earl, 'in all time coming, her Majesty's right of the feu, and other duties, casualties, and services, of all and sundry the heritable
'vassals,

‘ vassals, and others within the said earldom, &c. with full and sole power to the said James Earl of Morton, and his forefairs, in her Majesty’s place, as remaining still their immediate superior, to enter and receive the said heritable vassals who now actually hold of her Majesty and the Crown, and their heirs ; and to grant charters and infeftments to whatever person or persons of the said earldom, &c. upon resignation or disposition of the said vassals, or decreet of sale, apprising, or adjudication from them, *and to intromit with, uplift, and dispoſe, all and sundry the casualties of the said vassals already vacant, or that may happen to become vacant* by single liferent, escheat, ward, non-entry, recognition, or any other manner of way whatever.’

This charter was ratified in parliament. The Earl of Morton entered into possession, and his right was rendered perpetual and irredeemable by an act in 1742, and a charter following on it.

Sir Laurence Dundas having purchased the whole estates of the Earl of Morton in Orkney and Zetland, brought an action against the officers of state for the interest of the crown, and against the whole landholders in these islands, concluding, *inter alia*, that he had a right under the grant 1707, as the King’s commissioner, to enter the crown-vassals, by giving them charters and precepts for infeftment.—That he likewise was entitled, as grantee of the crown, to insist against the crown-vassals for the feu-duties, and for the compositions due on the entry of heirs and singular successors, whether they receive their entries from him or from the exchequer.

Upon the conclusions of the libel, the court found, ‘ That, under the grant 1707, the pursuer has no right of entering the vassals of the lands foresaid holding of the crown ; but that, in virtue of the said grant, the pursuer has a right to the feu-duties claimed ; *and, as to the casualties on entries of heirs, or singular successors, reserve to him all claim competent for the same before the court of exchequer, as accords.*’

The pursuer having carried the cause by appeal into the House of Lords, the other parts of the judgment were affirmed ; but, it was ordered, ‘ That the cause be remitted to the court of session in Scotland, to give judgment either upon the matter of right in controversy between the parties, with regard to the appellant’s claim to the casualties on entries of heirs, or singular successors, and the nature and extent thereof, or, upon the competency of the said court’s jurisdiction to take cognisance of the question.’ Parties were accordingly ordained by the court to be heard upon both points.

On the point of *competency*, the defenders objected to the jurisdiction of the court, and

Pleaded: By the statute 6to An. c. 26. it is enacted, That ‘ *all revenues, debts, duties, and profits, of what nature or kind soever, belonging to the crown,*’ and ‘ *all fines, issues, forfeitures, or penalties accruing to the crown, shall be within the jurisdiction of the court of exchequer, and are hereby annexed to that court.*’

The pursuer claims the *revenue and profits* of the crown, arising from certain casualties, by virtue of a grant in 1707. This case, therefore, comes properly under the jurisdiction of the court of exchequer. Tho’
the

the court of session were to pronounce a judgment upon it, the grant could not be made effectual without the authority of the Barons of exchequer; and, if they were of a different opinion from this court, it may be doubtful whether they would allow the decree to be put in execution.

Answered for the pursuer: That his claim is not founded on a mere personal grant, but upon an original charter and investment from the crown, and he is now insisting in a declarator of his right under these titles to the casualties of superiority transferred by them. It was only in this court that the action was competent, or that the objections made by the defenders to the validity of these titles could have been effectually removed.

The court of session had a jurisdiction exclusive of the exchequer, previous to the union, in all questions of this kind; a. 1661, c. 59. And this jurisdiction is reserved to it by the act 6to Ann. c. 25. establishing the present court of exchequer.

The court 'repelled the objections to its jurisdiction to take cognisance of the question now under debate.'

On the *merits of the cause*, separate defences were made for the crown and its vassals.

Pleaded for the vassals: That they are accountable in exchequer only for the casualties of superiority on entering heirs and singular successors, and they are entitled to have the compositions for such entries settled there, according to the rules established in the case of all crown vassals. This is the right and privilege of every vassal of the crown; and the defenders have an obvious interest, that they shall not be obliged, in place of exchequer, to transact with the pursuer for these compositions, on the terms required by subject superiors. —But, whether the grant of the casualties in 1707 will entitle him to exact from exchequer these dues and compositions, after they are paid into it by the crown-vassals, is a separate consideration, in which only the crown is concerned.

The defenders, whose rights are here in question, hold feu of the crown; and, consequently, the *quantum* of relief due by them upon the entry of heirs, is a *duplicando* of their feu-duty.

This is the established rule in exchequer; and the statute 1507, c. 74, enacts, that the relief cannot be dispensed with, nor compounded in the case of feu-holdings from the crown.—Sir George M'Kenzie is of opinion, that the act imports a prohibition of gifting the relief, and that such a gift would not be effectual to prevent the vassals from accounting for it in exchequer; *vide* Ersk. inst. b. 2. t. 5. § 50. If the pursuer, therefore, has any title to this casualty, he can only claim it after it is paid into exchequer.

It is a rule of long standing in exchequer, to receive every singular successor upon paying a small fine. The compositions which now take place were settled in the reign of Queen Anne, and appear to have been originally founded in acts of privy council, mentioned in the statute 1578, c. 66.

They are now to be considered as established by law, and the constitutional rules by which all the vassals of the crown are to account in
ex-

exchequer. The crown could not, by a grant in favour of a third party, deprive the defenders of the benefit of the law in this respect, and subject them to any higher compositions whatever than crown-vassals are liable for.

But usage, in this case, explains the intention of the grant, and shows, that parties did not understand it was meant to take from these vassals their right of transacting in exchequer. The vassals have continued to settle and pay these compositions in exchequer when they occurred, in the same manner after the grant as before it, and no demand was ever made on them by those in the right of this grant, until the present action.

Pleaded for the crown: From the terms of the grant 1707, it appears, that the right of uplifting these casualties was considered merely as an appendage of the power conferred upon the grantee to enter the crown-vassals. But, as it had been finally determined, that the clause conferring this power, is null and void, the right to the casualties following upon it falls of course.

These casualties of superiority are inseparable from the right of superiority, because they are occasioned by the very act of receiving the vassal. If they were disunited, no compulsitor would exist to make them effectual; for a person who is not in the right of superiority has no title to insist in a declarator of non-entry. These casualties have alwise been considered as dependent on the right of superiority.—The lords of erection, whose grants contain church-lands which had been feued out before the reformation, are entitled to the feuduties of the vassals, even if they should chuse to hold of the crown; A. 1633, c. 14. and 1661, c. 53. But, in that case, the Lord of erection has no claim to the casualties.—They must be paid into exchequer, and remain there as part of the crown-revenues.

By the act 1587, c. 70. it is ordained, 'That his Majesty's casualties shall not be given away in great as of the casualties of a haill country together.' In the present case, therefore, the grant by the crown of these casualties was prohibited by statute, as well as illegal at common law.

The grant cannot be supported as authorised by the act of dissolution, or any other statute.—The act did not empower the crown to dispose of the casualties exigible from the crown-vassals in Orkney and Zetland. It mentions casualties in general terms, as among the parts and pertinents of the earldom and lordship; but the casualties in question were no part nor pertinent of either; nor had the grantees of this earldom ever any right to them.—The clause in the original charters, '*cum tota superioritate libere tenentium*,' was altogether void, as the right of superiority disposed of was inseparable from the crown, and could not be transferred. Consequently the disponees could derive no right to the casualties of superiority from this grant of the right of superiority, which was itself null.

The act of parliament confirming the grant being a private act, the right of the crown-vassals was saved to them by the act *salvo jure cujuslibet*, passed in the same session:—And, in the act 1744, there is a clause reserving the rights of third parties.

H h

Answered

Answered for the pursuer : It does not affect the present question, that the pursuer has failed in supporting the grant 1707, so far as it conferred a power of giving entries to the vassals of the crown.—This part of the grant was considered as unconstitutional and illegal.—But it has been already established by a final judgment, that the *feu-duties* payable by the vassals of the crown in Orkney and Zetland are carried by this grant. As it is effectual to convey the *fixed* profits of superiority, no solid reason can be given, why it should not have the same legal effect in conveying the *contingent profits* arising from the casualties.

The difficulties started by the defenders, as to making effectual a gift of these casualties, are merely imaginary.—They may be separated from the superiority without any inconvenience ; the gift of them carries with it an implied mandate, to insist in a declarator of non-entry, by which the benefit of the right can only be obtained.

There are no words in the statute 1587, c. 74. prohibiting the crown to grant the casualty of relief.—The act is merely an injunction on the sheriff not to take compositions, and to account in exchequer.

Neither was the statute 1587, c. 70. any bar to the grant.—This act seems to have been little regarded from the first. Sir George McKenzie considers it as solely relative to gifts of single escheat ; and, even as to these, mentions an instance, where the court had repelled an objection founded on it. Many considerable gifts of escheat were made after this act, without challenge.—Consequently, it must be considered as obsolete.

The crown therefore, without aid of statute, may dispose of its casualties as well as its feu-duties.—But, in this case, the crown was authorised, by the previous act of parliament, to grant the whole earldom, &c. ‘*with all its parts, pertinents, and casualties.*’—These words of the act apply to the casualties in question, which, from the first erection of this earldom, have been part and pertinent of it. The grant to the right of superiority, in the original charters, implied a grant to the profits thence arising.—Though it has been found that the right of superiority itself could not be validly conveyed by the crown ; yet, as the profits thereof were disposable by the crown, the grant was effectual to convey them, whether feu-duties or casualties.—These profits are therefore part of the earldom and lordship, and considered as such in the act of dissolution.

The pursuer, having right to these casualties, is entitled to insist, that, before the crown-vassals apply to exchequer for their charters and precepts, they must settle the composition with him ; and he is not obliged to accept of the small compositions demanded in exchequer. There is not any legal tie on the crown to continue the benignity they show their vassals in this respect ; and it is only as authorised by privy-seal warrants, that the Barons have power to accept of such compositions.—But, as the crown was divested of the casualties of superiority in this case by the grant 1707, a privy-seal warrant could not afterwards affect the right of the grantee, or oblige him to
accept

accept of any thing less than the legal composition of a year's rent from these vassals. They had no *jus quæsitum* from the mere act of favour given by a privy-seal warrant, which, if there had been no grant of the casualties, could only be effectual until recalled, and fell of course on the demise of the sovereign.

If the grant gives a right to uplift these casualties, that right cannot be lost *non utendo*.—A particular composition will prescribe, if not demanded within the years of prescription ; but the neglecting to exact such compositions, for any length of time, does not annul the general right of the crown, conferred on the grantee, to demand its casualties whenever they open anew.

The court pronounced the following judgment : ‘ The Lords having
 ‘ reconsidered the memorials, &c. and having also considered the
 ‘ acts of dissolution of the earldom of Orkney in the years 1707
 ‘ and 1742, with the charters issued from exchequer in pursu-
 ‘ ance of these acts ; and particularly, that clause in said charter,
 ‘ by which the pursuer claims the sole power of entering and re-
 ‘ ceiving the heritable vassals of the crown in Orkney and Zet-
 ‘ land, and of intromitting with, uplifting, and disposing of all
 ‘ and sundry the casualties of the vassals vacant, or which shall
 ‘ happen to vack in all time coming ; and having also considered
 ‘ the possession which has been uniformly held and enjoyed, as
 ‘ well by the King’s Majesty and his vassals, as by all the Earls
 ‘ of Morton and the pursuer, since the date of these charters to
 ‘ this time : Find, that, as the first part of this clause, granting
 ‘ the power of entering the King’s vassals, has been declared void
 ‘ and null by judgment of this court, affirmed in the House of
 ‘ Peers, so the after part of the clause, granting the casualties at-
 ‘ tendant upon, and consequential of the entry of these vassals,
 ‘ is also void and null, and that the clause in both branches is il-
 ‘ legal and unconstitutional, as well with respect to the rights
 ‘ of the sovereign, his heirs and successors, as with respect to
 ‘ the rights of the heritable vassals of the crown. And find,
 ‘ that the above clause was not warranted by the words, nor by
 ‘ the meaning and intendment of the act of dissolution 1707,
 ‘ nor of the act 1742. And find, that the charter 1707, tho’
 ‘ ratified in the parliament of Scotland, yet, being a private act,
 ‘ the just rights of the King’s vassals were saved and reserved to
 ‘ them and their heirs, by the act *salvo jure cujuslibet*, passed in
 ‘ the same session of parliament ; and, in like manner, that the
 ‘ same rights of the King’s vassals were saved and reserved to
 ‘ them by the saving clause in the act of parliament 1742. And
 ‘ find, that this interlocutor applies, and shall extend to all the
 ‘ defenders who are entitled to hold of the crown, as explained
 ‘ by the former interlocutors in this cause : And, upon these
 ‘ grounds, the Lords sustain their defences, and assoilzie them
 ‘ from the conclusions of the pursuer’s declarator.’

Adv. D. Rae, Wight.

Adv. Advocate, J. Campbell.

Clerk, Orme.

No.

No. LXV.

February 4. 1779.

ALEXANDER GRAHAME,

Against

MARGARET GRAHAME.

Deathbed.

GRAHAME of Hourston executed an entail of his estate on his five sons *seriatim*, and the heirs-male of their bodies respectively, but did not record the entail.—Charles, the eldest son, succeeded his father, and was infeft upon the precept in the disposition of entail.—Upon his death, Henry, his only son, entered into possession of the estate, without making up any titles, and contracted a considerable debt to his sister Margaret, and her husband, Robert Grahame.

Subsequent to this contraction, the entail was recorded ; after which, Henry granted a lease of part of the entailed lands to his sister Margaret and her husband for 171 years. Henry possessed the estate for 30 years, as heir apparent, and died without issue ; upon which the succession opened to his uncle Alexander Grahame, youngest son of the entailer.

Alexander made up a title by a general service, as heir of tailzie to his brother Charles, the heir last infeft ; and, on this title, brought a reduction of the abovementioned tack by Henry Grahame to his sister, and a removing from the lands, on various grounds ; among others, that the lease was granted on deathbed.

Objected by the defender to the pursuer's title : The property of the lands leased to the defender is still *in hæreditate jacente* of Charles Grahame, the heir last infeft, and cannot be taken up by the pursuer without a special service to Charles.—The pursuer's general service establishes his propinquity, but does not vest in him the right of property in the lands. He has therefore no other title to carry on this action but his right of apparenacy.

A lease of lands clothed with possession, is a real right in the lands for the time ; and, therefore, according to the general principle, cannot be challenged by the heir while the lands are *in hæreditate jacente*.

An exception is admitted in the case of a reduction on the head of deathbed, brought by an apparent heir of line ; but it has been found, that this privilege, given to the *natural* heir, does not extend to the heir of provision ; Edmonstone *contra* Edmonstone ; March 16. 1637, Durie.

Although

But further:—The pursuer is not the apparent heir of Harry Grahame, the granter of the deed, nor can make up any titles to him as his predecessor in the lands.—It is only by serving heir in special to Charles Grahame, the heir last infeft, that he can vest himself in the property of this estate. He is, therefore, in the proper and legal sense of the words, the apparent heir of Charles Grahame, and has no connection with Harry Grahame, while the lands are in *hereditate jacente*.

The pursuer avoids making up his titles to Charles, that he may not be subjected to the debts and deeds of the interjected heir, Harry Grahame, upon the statute 1695.—His conduct, therefore is *in fraudem* of the statute; and the pursuer ought not to have the benefit of challenging the deeds of Henry Grahame, while, by lying out unentered, he does not become liable for his debts and deeds, as the statute justly requires.

Answered for the pursuer: That, by his general service, he is ascertained to be the heir entitled to take up the succession to this subject; but, without that service, he has sufficient title, as heir apparent, to carry on the present action. The law has given the privilege of reduction *ex capite lecti* to heirs of provision and tailzie, as well as to the heirs of line.—Consequently there is no room for any solid distinction betwixt the heirs apparent of the one kind and of the other. Both are accordingly now considered as equally entitled to challenge deeds on deathbed granted to their prejudice, though antiently the law might be different in this respect; *vide* Erskine, B. 3. t. 8. § 100.

The pursuer is heir-apparent to the *granter* of the deed.—Before the act 1695, there was reason for considering the interjected apparent heir as a stranger. His successor serving to a remoter predecessor was not liable in implement of his debts or deeds. But now he is made, by such service, to represent the interjected heir, who has been three years in possession, as much as any predecessor to whom he serves;—consequently, before he makes up his titles, he is truly and substantially apparent heir to the interjected heir. This is the meaning which the statute itself puts upon the term Apparent Heir. The statute says, 'That, when he is served, ' he shall be liable for the debts and deeds of ' the person interjected, to whom he was apparent heir.'

The court found, ' That the pursuer's general service is no sufficient ' title to pursue this action: But found, that the pursuer's right ' of apparenacy as heir to Charles Grahame, is a sufficient title to ' carry on the process of reduction on the head of deathbed.'

Lord Ordinary, Gardenston.

A&S. Stewart.
Clerk, Menzies.

Alt. Swinton.

No. LXVI.

February 5. 1779.

T H O M A S D U N L O P E, and others,

Against

*A L E X A N D E R S P I E R S, and others.**Right in security.*

DUNLOPE and Ralston merchants in Virginia, upon a settlement of accompts in September 1763 with James Dunlope merchant in Glasgow, accepted bills to him at twelve months date for the balance in his favour.

At this time James Dunlope had a cash-credit with Dunlope, Houston, and Co. bankers in Glasgow, to the extent of L. 1500. In the bond of credit, his father, Dunlope of Garnkirk, and others, were jointly bound with him to the banking company.—But the credit being entirely for the use of the son, he and his father granted a bond of relief to the other obligants.

Dunlope junior having drawn out the whole of his cash-accompt, in order to replace the money, applied to the banking-company to discount a bill for L. 1500, accepted by Dunlope and Ralston to him, at the time of the settlement above mentioned. The company agreed, on condition that the bill should be indorsed by others for their further security.—This bill was accordingly indorsed by several of the cautioners in the bond of credit, upon which it was discounted by the company, and the cash placed to the credit of Dunlope junior.

In November 1763, Dunlope junior having failed in his circumstances, disposed his whole effects to trustees, and, in a few days after, he was rendered bankrupt.

Remittances were afterwards made by Dunlope and Ralston in part payment of their bill.—These were received at different times; all of them after the bankruptcy and trust-right of James Dunlope, but previous to the term of payment of the bill, except one small payment, which was subsequent to it.

The bill, when it fell due, 22d September 1764, was protested by the banking-company for non-payment, and diligence done upon it against the acceptors; but, as nothing could be recovered from the acceptors, the company came upon the indorsees. Dunlope senior being ultimately obliged to relieve them, his trustees paid up the bill, and took an assignation to the debt and diligence.—They afterwards adjudged the estate of Dunlope junior upon the bill and assignation, and brought an action against his trustees for a dividend of his effects, correspond-

corresponding to the whole sum of L. 1500.—In objection to this claim,

Pleaded for the defenders: Where different persons are bound for the same debt, the creditor may attach the estate of each co-obligant, and may rank upon the estate of each for the whole debt.—But if, before using diligence to affect the estates of the several co-obligants, he has either accepted a voluntary payment from one of the debtors, or received a dividend out of one of their estates, he can only claim from the other obligants the balance which remains.—No diligence by adjudication, arrestment, &c. could be led against their estates for any thing more. The partial payments, therefore, made by the acceptors in this case, having been all previous to any diligence done on the estate of Dunlope junior by the holders of the bill, these last can only rank for the residue, after deducting the payments.

The trust-disposition by Dunlope junior in favour of his creditors, was not equivalent to real diligence done on his estate.—No *lien* was created over the subjects, or at least that part of them which consisted of moveables.—These effects were vested in trustees, who had right to sell the whole, and uplift the price; and the creditors had only a personal right of action against these trustees to account.

But the partial payments must be deducted, even although this trust-disposition should be held as pledging the subject to the creditors of Dunlope junior; for the indorsees were not at that time creditors to him.—The trust-right was executed in November 1763, and the bill was not payable till September 1764.—Before the term of payment, it depended altogether upon an uncertain event, whether the drawer was to become debtor to the holders of the bill or not. If the bill had been paid by the acceptors at that term, no debt whatever would have existed against the drawer. As it was not paid, the indorsees became creditors to Dunlope the drawer, but the debt only commenced at the date of the protest for non-payment 25th February 1764. The whole partial payments had been made (excepting the last) previous to this protest; consequently they must be deducted in computing the debt due by Dunlope to the indorsees; and the pledge, or security, supposed to be established by the trust-right, can extend to no more than the balance.

Answered for the pursuers: The holders of the bill, in the present case, as creditors of James Dunlope, had a security over his subjects by the trust-right in November 1763.—This security extended to the whole bill, there being no part of it paid at that time.—The partial payments afterwards made by the acceptors, could not affect the right thus acquired over the subjects.—It is an established point, that, where a creditor has different persons jointly bound for the same debt, after a lien is created in his favour over the estate of one obligant in security, a partial payment received from another, though in the end it will diminish the debt, does not affect or diminish the security.

A trust-right creates a real lien over the subjects of the debtor in favour of his creditors, equivalent to attachment by legal diligence.—In one case, the security is voluntary, and, in the other, it is obtained by an operation of the law; but, in both, the effect is the same,

same, giving every creditor a right to be ranked on the subjects for his whole debt at the time.

The holders of the bill were creditors to Dunlope in the whole amount of it from an earlier period than the trust-right. When the drawer of a bill indorsee it for value, he becomes, from that time, debtor to the indorsee. By receiving the indorsee's money, the drawer comes under an obligation, that the bill shall be paid. The existence of this obligation depends on no event nor condition, but takes place from the beginning, and arises from the transaction. It is only the endurance of the obligation which depends on the *event* of the acceptor's paying, or not paying, the contents of the bill.

The nature of the transaction implies, that the indorsee must first demand his payment from the acceptor when the bill falls due. If the bill is not accepted, or not paid, the indorsee likewise, from the tacit engagement he is under to take care of the drawer's interest, is obliged to protest the bill, and give the drawer timely notice if it is dishonoured.—But the obligation on the drawer is, notwithstanding, direct; for the indorsee has immediate recourse against him, and is not obliged to discuss the acceptors by legal diligence, as in the case of subsidiary obligations. In the present case, it neither happened that the acceptors paid the bill, nor that the holders failed in any requisite incumbent on them; consequently the original obligation on the drawer was never removed.

Allowing the obligation on the drawer to be only subsidiary.—Where a debtor is *vergens ad inopiam*, and still more, where he is bankrupt, adjudications, or other diligence, may proceed against him, for the purpose of security, upon debts *in diem*, and conditional debts, whether he is principal or cautioner. The indorsees of this bill, therefore, were entitled to secure themselves by diligence on the effects of Dunlope at the time he became bankrupt, November 1763.—Consequently, from that period, they had a right to the benefit of the trust as much as any other of his creditors.—It came in place of the security which they would have otherwise attained from attaching his effects by legal diligence.

The judgment of the court was, ' Find, That the pursuers are only
' entitled to receive a share of the dividends of James Dunlope
' junior his effects, effeiring to the sum of L. 787 : 11 : 8 Sterling,
' being the balance resting on the L. 1500 bill, after deduction
' of the payments received before the term of payment of the
' bill, and of the protest thereof; and remit to the Lord Ordinary
' to hear parties procurators on the effect of the payments made
' after the term of payment of the bill, and the protest thereof,
' with power to his Lordship to do therein as he shall see just.'

Lord Ordinary, *Kennet.*
Clerk, *Robinson.*

A&S. Sol. General,
J. Campbell, Rae.

Alt. Lord Advocate, *Wight,*
Blair, Craig.

No.

No. LXVII.

February 6. 1779.

JAMES DICKSON,

Against

ADAM WATSON.

Bankrupt.

GEORGE LANDELS possessed part of a farm as subtenant under his father James Landels. Having fallen into arrear of half a year's rent, the sheriff, upon the application of the father, sequestrated his crop and stocking for security of this arrear, and of the half year's rent to become due at the next term.

Before that time George Landels became bankrupt. His personal effects were sequestrated upon the act 12th Geo. III. and a factor was named. The factor sold his crop and stocking, and paid up to James Landels the year's rent due by his son.—The factor, in the state of the bankrupt's funds lodged by him, took credit for this article; to which it was

Objected by a creditor of the bankrupt: That this arrear of rent is paid by the factor, without having been claimed and proved by the creditor as the statute directs, and therefore cannot be allowed.

Answered for the factor: The creditor, in this case, had a security over the crop and stocking of the bankrupt by his hypothec, and would have been entitled to draw his payment out of these subjects, without coming into this court to claim and instruct his debt. He had obtained a sequestration of these subjects from the sheriff for making his debt upon them effectual, before the sequestration under the statute had taken place. In these circumstances, the creditor was not obliged to part with the effects to the factor, and make the circuit of claiming and proving his debt before he could recover it. He might have proceeded to sell the subjects under the authority of the sheriff, by whom they were sequestrated; and thereby got immediate payment of his rent.

There is nothing in the statute to have prevented him from following this course.—The statute does not take away the right of hypothec itself, nor the summary methods founded on it, which have been constantly practised by landlords for recovery of their rents.

As, therefore, the creditor could have recovered his debt out of the effects, by means of the sequestration, without claiming in this court, it was for the interest of the other creditors to pay up the debt, and relieve the effects of this burden.

K k

Replied

Replied for the objector: The sequestration awarded by the sheriff could have no other effect prior to an actual sale, than to secure the subjects falling under the hypothec from being embezzled. It did not transfer the property of the effects to the bankrupt's father, and could not prevent them from falling under the general sequestration of this court.—So it was found in the case of Brown *contra* Gordon and Fraser, 1773.

These effects, therefore, could not have been disposed of by the father at his own hand, or by warrant of the sheriff.—The debt, no doubt, continued preferable in consequence of the hypothec; but there was no method of obtaining payment, except by claiming and proving it, as directed by the statute.

The court 'sustained the objection to the rents stated as paid to the father, these debts not having been claimed or proved by the father in terms of the statute.'

Lord Ordinary, *Alva*.

A^d. M^r. Leod.
Clerk, *Tait*.

Alt. *Sinclair*.

No. LXVIII.

February 10. 1779.

Colonel JAMES SINCLAIR,

Against

The MAGISTRATES and TOWN-COUNCIL of
DYFART.

Servitude.

THE inhabitants of Dyfart had been in the immemorial use of bleaching their linen on a spot of ground situated within Letham-park. In an action brought by Colonel Sinclair, proprietor of this park, against the magistrates and town-council of Dyfart, the pursuer, *inter alia*, insisted that the inhabitants were not entitled to make this use of the park, and

Pleaded: The corporation has no right, either from its charter, or other titles, to the property of this ground, or to any servitude over it.

The right of bleaching on the grounds of another, as it is not a servitude known in law, cannot be acquired by mere possession. This was expressly found in the case of Carmichael against the town of Falkland, 13th February 1708, Fount.; and by a judgment of the house of Lords reversing a judgment of this court, where the right of bleaching

bleaching had been sustained upon a prescriptive possession; Ninian Jeffray against the Duke of Roxburgh, 18th February 1755.

Answered for the defenders: It is of no consequence that the town's charters do not make any special mention of this green. These charters give the corporation a right to the territory of the town, including houses and lands, unlimited by precise boundaries; and, therefore, this green having been immemorially possessed by the inhabitants, must be held as part of the town's property.

But, supposing the right of property were vested in the pursuer, immemorial usage has established a servitude of bleaching on this spot of ground in favour of the town. Though law-books take notice of particular servitudes which occur most frequently under known names, they do not say that no other servitude can be legally constituted.—Servitudes are as various as there are lawful uses which one man may make of another's property; *Voet. l. 8. t. 3. § 12.*; *Stair, b. 2. l. 7. § 5.* Bleaching is certainly a lawful use of lands; and, therefore, the privilege of bleaching on the grounds of another, may be acquired by every method known in law for acquiring servitudes.

The court found, ' That the town of Dyfart, as a body corporate, ' could, for the use of the burghesses, and other inhabitants, acquire by purchase, or by immemorial usage and prescription, the ' servitude here contended for, in its full extent, of water from ' said wells, for family-use, washing, drying, and bleaching their ' cloaths and linens; and that the corporation, for behoof of its ' burghesses and its inhabitants, have, by immemorial usage and ' prescription, acquired a servitude, or privilege of taking water ' from said two wells, both for family-uses, and for washing their ' cloaths and linens, and of drying and bleaching the same upon ' the said green.'

Lord Ordinary, *Covington.*

Ast. Crobie.
Clerk, *Menzies.*

Alt. *Ilay Campbell.*

No. LXIX.

February 12. 1779.

J O H N T A I T,

Against

D A V I D K A Y.

Creditors of a defunct.

DAVID BERVIE was debtor to Helen Simpson at the time of her death in a considerable sum.

Henry

Henry Simpson, her brother, having been confirmed executor, *quæ* nearest of kin, David Kay, one of his creditors, charged him for payment, and arrested in the hands of Bervie, debtor of the deceased Helen Simpson. Others of Henry Simpson's creditors followed the same course, and David Bervie brought a multiple-poining.

Henry Simpson dying soon after, Alison Kay, his relict, expeded a confirmation, as executrix nominate to him; and, among other subjects, confirmed the debt due by David Bervie.

Janet Bervie, a creditor of Helen Simpson, having assigned her claims to John Tait, he obtained decree for payment against Alison Kay, as executrix confirmed to her husband, who was executor confirmed to Helen Simpson. This decree was not obtained till the expiry of near two years and a half after the death of Helen, and the confirmation of Henry Simpson.

Tait produced his decree in the multiple-poining, and contended, That, as the immediate creditor of the person, to whom the fund in question originally belonged, he was preferable on it to all the arresters, who were only the creditors of Henry Simpson, the next of kin. In support of this claim,

Pleaded for Tait: The proper funds of a defunct ought to be applied to the payment of the defunct's debts, before they can be touched by any creditor of his executors.—If the executor is the next of kin, a residuary right may remain to him in the defunct's effects, *deductis debitis*; but, until the debts are paid, he is no more than a trustee, and his creditors can have no right to payment out of effects which he only holds in trust.—Accordingly, it is laid down by our lawyers, that the creditors of the defunct are always to be preferred on the executry funds to those of the executor, though the latter should have used prior diligence; Stair, b. 3. t. 8. § 60.; Ersk. b. 3. t. 9. § 42. And it is not said by these writers, that there is any limitation in point of time upon the creditors of the defunct in demanding their payment. They are considered as always preferable to those of the executor, as long as there are funds in his hands.

The act 1695, c. 24. does not invalidate this doctrine.—The object of this act was, to give a remedy to the creditors, both of the defunct and of the nearest of kin, where the nearest of kin did not confirm. All the provisions in the act are relative to the case of there being no confirmation. In the first part of it, the mode of attaching the defunct's subjects is pointed out; and it is added, 'With this provision always, that the creditors of the defunct doing diligence to affect the moveable estate within year and day of the debtor's decease, shall always be preferred to the diligence of the nearest of kin.'

It is therefore only in case the nearest of kin does not confirm, and the creditors follow out the course prescribed by the statute, that this provision applies, or that the limitation on the heirs of the defunct can take place.

When the next of kin confirms, he becomes trustee for all the creditors; and, on the established principles of law above mentioned, the creditors of the defunct must be paid out of the subjects before
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any residue to which he may be entitled can be affected by his creditors.

Answered for the creditors of the nearest of kin: Antiently, in the law of Scotland, as well as in the early period of the Roman law, the heir was so much considered as *eadem persona cum defuncto*, that no distinction was made after the defunct's death betwixt the debts of the one and the other. The estate to which he succeeded was equally liable to be attached by the diligence of his own creditors as of those of his ancestors, without any difference but what might arise from the nature or priority of the diligence itself. This was remedied in the law of both countries, and a preference given to the creditors of the defunct; but, in justice likewise to the creditors of the heir, the law, wherever it gives the remedy, restricts it to a limited time.—In the Roman law, the creditors of the defunct were obliged to apply for the *beneficium separationis*, allowed by the *prætor* within five years, otherwise the general rule took place.

Previous to the act 1621, c. 24. it appears to have been our law, that, after titles were made up to the ancestor's *heritable* subjects by the heir, no preference was given to the creditors of the ancestor. By this statute, a preference is established in their favour, but, under the provision, that diligence is done against the estate of the defunct by them within three years after his death.—The terms of the statute imply, that both the preference itself, and the limitation attending it, hold equally in the case of an heir entered, and an heir in apparençy.

In *moveable* succession, it was a doubtful question, prior to the act 1695, whether the creditors of the defunct had a preference? In one decision it was found, that they had; *Laird of Kirkhead contra Irvine*, 16th December 1674, *Stair*.—This seems, however, to have been still considered as a point not fixed; *vide* Sir John Nisbet's doubts, *voce* Execution. But, by the act 1695, a permanent rule was established.

It appears from the narrative of this statute, that the purpose of the legislature was to put the moveable succession on a footing with the heritable, so far as circumstances would permit.—It sets forth, that the law is deficient as to the affecting with legal diligence the moveable estate of a defunct, 'in such a manner as a defunct's *heritage* may be affected.' A preference of the same kind, as in heritage, is given to the creditors of a defunct; but the less permanent nature of the subject suggested, that in moveables it should be of shorter endurance; and, accordingly, the statute confines it to a twelvemonth.

This limitation of the preference takes place whether the nearest of kin lies out without confirming, or expedes a confirmation. The doctrine, that executors confirmed are no more than trustees for the creditors, and have no right themselves in the effects, may apply to executors nominative or dative; but not to the nearest of kin confirmed. The nearest of kin is the heir in moveables, and the confirmation no more deprives him of that character, and renders him merely a trustee, than a service as heir reduces an heir in heritage to that state.

—He must indeed discharge the burdens affecting the moveable estate to the extent of the inventory, and he will not be benefited by the succession beyond the free residue.—In both respects, the case of an heir with respect to heritage, is entirely similar.

But, whether the nearest of kin after confirmation be considered as a trustee, or as *hæres in mobilibus*, the statute 1695, both from the terms and intendment of it, reaches to the case of the next of kin confirmed, in like manner as the statute 1661 reaches to the case of an heir served.—The *heritable* and *moveable* succession must be put on the same footing, agreeable to the intendment of the statute.

The court found, ‘ That Mr Tait is entitled to be preferred to the
‘ other competitors on the funds *in medio*, for his claims in right
‘ of Janet Bervie, as it is a debt due by Helen Simpson, to whom
‘ the funds belonged.’

Lord Ordinary, *Ankerville.*
Clerk, *Gilson.*

Aff. *Armstrong.*

Alt. *Rolland, Sinclair.*

No. LXX.

February 17. 1779.

J O H N B U R N,

Against

W I L L I A M A D A M.

Member of Parliament.

AT the Michaelmas head court for the county of Kinross 1778, John Burn claimed to be enrolled as a freeholder on the following titles: *1mo*, Charter of sale and resignation under the great seal of the lands and barony of Kinross, and others, in favour of George Graeme, Esq; *2do*, A contract of wadset, by which Mr Graeme disposed to the claimant certain parts of the lands contained in the charter, and conveyed the said charter and precept of seizin to him, so far as respected the lands mentioned in the contract. *3tio*, Instrument of seizin proceeding on the charter and contract. Along with these titles, the usual certificate was produced, that the lands disposed stood valued in the cess-roll at or above L. 400 valued rent.

Objections were made to the claimant's titles by Mr Adam, one of the freeholders, and it was carried on a vote *not to enroll*. The claimant complained to the court of session.

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In the answers to this complaint, the following *objection*, which had not been made at the meeting, was stated to the claimant's qualification. The charter of the estate of Kinrofs, and, in particular, that part of it disposed to the claimant, is disconform to the signature on which it proceeded, in this respect:—That the charter contains different parcels of land said to be part of the barony of Kinrofs, which are not specified in the signature, as comprehended in this barony. The charter, therefore, as being disconform to its warrant, is void, and consequently cannot avail the complainer in support of his claim.

The claimant contended, in the *first* place, That the court was not competent to judge of this objection, because it had not been proposed in the meeting of freeholders, and was only stated in the proceedings upon the summary complaint.—Upon this point the same arguments were used by the parties, as in a case where it had formerly occurred, Stewart *contra* Dalrymple, July 28. 1761, in which the court had sustained their jurisdiction by a judgment affirmed in the house of Lords. It was further

Pleaded for the complainer: That the court of freeholders were not competent to judge of this objection, though it had been stated at the meeting.

A charter from the crown of lands, of such value as the law requires, and infestment on it, are the only titles requisite to produce to the meeting of freeholders, in order to be enrolled. The jurisdiction of the freeholders goes no further than to see the proper evidence, that the claimant has those feudal titles vested in him.—They may judge of such objections to the validity of the titles as appear on the face of them; but they have no right to investigate the grounds and warrants of the charter, in order to determine upon its validity.—They cannot even oblige the claimant to produce them.

Mr Graham's charter from the crown is, *ex facie*, perfectly complete, containing every parcel of land upon which the complainer founds his qualification. The objection now offered does not appear on the face of the charter, but is gathered from one of its warrants. It is therefore extrinsic, and cannot be judged of by the freeholders.—The proceedings of freeholders in taking cognizance of extrinsic objections have been often over-ruled by the court: Sir Patrick Dunbar against Budge, 26th February 1745; Campbell of Shawfield against Muir, 5th February 1760; Walter Stewart against David Dalrymple, 28th July 1761.—The court have decided on the same principles in a variety of cases where objections were made to decrees of division, produced in evidence of the claimant's valuation.—Such objections as appear *ex facie* of the decree, may be considered by the freeholders; but they cannot enter on any extrinsic objection drawn from the grounds of the decree; Galbreath against Cunninghame, 17th January 1755; Forrester against Preston, 18th February 1755; Wemyss against M'Kay, 28th February 1759; Campbell against Grahame, 5th February 1760.

Answered for the respondent: It may be admitted, that the freeholders are not entitled to investigate the grounds of the claimant's charter, in order to determine, whether the right of property belongs to

to *him*, or to a *third party*. The claimant, by possessing under his charter and infeftment, is held in law to be the proprietor; and the freeholders have no jurisdiction to inquire any farther.—His right of property under these titles can only be challenged by a person claiming a right in himself to the lands. If the party entitled to bring the challenge does not choose to insist in it, but allows the claimant to continue in possession, it is *jus tertii* for the freeholders, or any other person, to object. This was the only point determined by the court in the decisions founded on by the complainer.

But, where the objection does not depend on a third party having a preferable right to the claimant, but on the *validity* of the titles themselves, and they are challenged as void and null, the objection is not *jus tertii* to the freeholders. If they have any right to see that title-deeds shall be produced at all, they must likewise be competent to examine, whether these deeds are false, or subject to any nullity; and, for this purpose, to admit of every kind of evidence, whether intrinsic or not.

Objections perfectly clear may lie to the verity of the titles, though not appearing on the face of them. A charter cannot be considered as proceeding from the crown, if it has not the authority of a signature.—The writing is null and void, as much as if it were forged; consequently the freeholders would be competent to judge of the objection, though it might require extrinsic evidence to support it. There is no distinction betwixt the case where a charter proceeds, without the authority of any signature, and the present case, where the signature does not authorise the charter; and the subjects conveyed by the latter are not mentioned in the former.—The freeholders, therefore, were competent to have judged of this objection.

The merits of the objection itself were argued by the parties, but received no judgment, the court being of opinion, that the freeholders were not competent to judge of the objection.

The judgment was, ‘ Repel the objections against the said John
 ‘ Burn his being enrolled in the roll of freeholders for the said
 ‘ county of Kinross; and find, that the freeholders of said coun-
 ‘ ty did wrong in refusing to enroll the said John Burn in the
 ‘ said roll; and therefore grant warrant to, and ordain the sheriff-
 ‘ clerk of said county to add his name to the said roll.’

Adv. Rae, Al. Murray.

Adv. Croftie.

No. LXXI.

February 19. 1779.

T H O M A S B U C H A N A N, and C O.

Against .

J A M E S S O M E R V I L L E.

Presumption.—Novatio debiti.

MESSRS. Bogle, Somerville, and Co. stood indebted to Thomas Buchanan and Co. in the sum of L. 97, for different articles by open accompt.

In July 1776, Somerville sold his share in the company to Jamieson, one of the partners.—The copartnery contract expired 1st May 1777; on which day the dissolution of it was advertised in the news-papers, and the creditors of the company desired to apply to Messrs Bogle and Jamieson for payment.—From that time a new company took place, under the firm of Bogle, Jamieson, and Co. consisting of the former partners, with this variation, that Somerville was entirely out, and one new partner assumed.

Buchanan and company soon after applied for payment of their accompt to Jamieson, who proposed, that, as immediate payment was not convenient, they should take a bill payable at six months date for the amount of the accompt.—The creditors agreed; but, understanding that the bill was to be accepted by the old company, drew it upon Bogle, Somerville, and Co. They likewise made out the accompt in their name, and subjoined a receipt to it in the following terms: ‘Received their acceptance for the above L. 108 : 17 : 0, payable six months after date, when paid is in full.’

In place of the above draught, the creditors afterwards agreed to take a bill accepted by Bogle, Jamieson, and Co. for the money.

This bill, when due, was protested for non-payment against the acceptors, who, before that time, had become bankrupt; and afterwards the creditors brought an action against all the partners of the old company, for payment of their accompt.—No appearance was made for any of them, except Mr Somerville, the others being likewise partners of the new company, and acceptors of the bill.

Pleaded in defence for Somerville: The debt due to the pursuers by Bogle, Somerville, and Co. was discharged by the pursuers, who took in place of it the bill accepted by the new company;—consequently the defender is not liable.

The pursuers are, at any rate, *in mora*. They ought to have demanded their payment from him at the time the company was dissolved. If they had done so, he could have paid them safely, as the

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new company were at that time solvent. But the pursuers wilfully postponed their payment, by taking the bill at six months.—They have themselves, therefore, only to blame, that they have come too late, and after their debtors are insolvent.

Answered for the pursuers: It is a transaction which will not, *in dubio*, be presumed, that a creditor consents to his debtor becoming free, upon another becoming bound. The consent of the creditor to free the original debtor must be clearly established; and, if circumstances can admit of another construction, it will not be inferred.

In this case, the pursuers did not give any absolute or unqualified discharge of the accompt to the partners of the old company on getting the bill. The discharge was only conditional, upon payment of the acceptance received for the amount of their accompt.—If the bill had been paid, the condition would have been purified, and the discharge effectual to all parties.—But, as it was not paid, no person is free from the debt who was formerly bound; and the partners of the old company, to whom the furnishings were made, are still liable.

This transaction did not cut out the defender from any relief against the partners of the new company, which he would otherwise have been entitled to.—The claim of the pursuers for payment must have preceded any step taken by the defender for relief. If the pursuers had allowed the matter to lie over during these six months upon the footing of the open accompt, without taking any acceptance, the defender still would have remained liable;—yet, in that event, he would have been equally deprived of his relief, as in the case that has really happened.

The court ‘sustained the defences, and assolizied the defender.’

Lord Ordinary, *Hailes*.
Clerk, *Tait*.

Act. Hay Campbell.

Alt. Wright.

No. LXXII.

February 25. 1779.

JAMES DYMOCK,

Against

WILLIAM DUKE of MONTROSE.

Glebe.—Minister's Fuel.

MR Dymock minister at Aberfoil brought an action before the court, against the Duke of Montrose, proprietor of the greater

er part of the parish, setting forth, that the mosses out of which the former ministers cast their peats were all exhausted, but that there still remained extensive mosses within the parish; ' and, therefore, that it should be declared, that the pursuer, and his successors serving the cure in that parish, have right of casting, winning, and away-taking feuel, fail, and divot, from the mosses still unexhausted, for the use of their families.'

Pleaded for the pursuer: By act 1593, c. 65. ratified by act 1661, c. 21. it is enacted, ' That the said glebes be designed with freedom of foggage, pasturage, feuel, fail, and divot, loaning, free ish and entry, and all other privileges and rights, according to use and wont of old.'

The expression in the statute, ' according to use and wont of old,' applies to the *usage* of supplying ministers with feuel and other articles mentioned in it, as well as the glebe.—The meaning of the clause is, that, as ministers were, according to antient custom, entitled not only to a glebe, but to feuel, &c. these other articles should be designed along with all glebes to ministers not already in possession of them.

It is not, therefore, necessary, that the pursuer should be able to show, that he, or his predecessors, have been in use of taking their feuel from the moss in question.—He is equally entitled to have feuel designed to him out of the mosses of the parish as a glebe out of the land of it. If a minister could not, under the statute, lay claim to any thing more than what he has been in immemorial possession of, this clause would be perfectly superfluous; for immemorial use is sufficient title to continue in possession without the aid of any statute.

Answered for the defender: The plain import of act 1593 is, that, notwithstanding the special right given in the first part of this statute to insist for designation of a glebe, such clergy as were in possession of any of the servitudes mentioned in the act should not, by getting the glebe, be deprived of the servitude.—This was necessary to prevent all misapprehension as to the meaning of the act.

If the statute were to be interpreted in the manner the pursuer contends for, it would pave the way for many claims on the part of the clergy, which they have not as yet pretended to.—The minister's claim to feuel would not be limited to peats. The statute makes no exception; and, therefore, where there are coal-pits, but not mosses, the minister would be entitled to a designation out of a coal-pit.—The clergy have the same right to the other privileges mentioned in the statute as they have to feuel.

Every minister in Scotland, therefore, would be entitled to insist, that the heritors shall provide him, not only with feuel, but also with foggage, fail, divot, &c. No such claims as these were ever heard of, which is satisfactory evidence of what has been always understood to be the intention of the statute.

The pursuer having likewise alledged, That he and his predecessors had, at different times, taken their peats from different mosses in the parish, besides the mosses now exhausted, the court ordained the pursuer to give in a special condescendence of these alledged acts of possession;

tion; and, a condescendence being accordingly given in, the court pronounced this judgment :

‘ Having resumed the consideration of this cause, with the foregoing condescendence in behalf of the pursuer, and answers for the Duke of Montrose defender, they find the condescendence not relevant.—Sustain the defence for the Duke of Montrose, and assoilzie him from this process.’

Lord Ordinary, *Monboddo*.
Clerk, *Campbell*.

Aët. *W. Robertson*.

Alt. *Lord Advocate*.

No. LXXIII.

February 26. 1779.

M' L U R E and M' C R E E,

Against

J O H N P A T E R S O N.

Factum Illicitum.—Sale of smuggled goods.

A Vessel loaded with foreign brandy in small casks having come in to Clanyard-bay, on the coast of Galloway, Paterfon, jointly with others, purchased on board of the ship part of the cargo.—The casks were brought on shore by the purchasers during night in boats hired by themselves, and were left on the coast among the rocks until a convenient opportunity should be got of carrying them away. In a few days after, the purchasers granted an obligatory missive to Thomas Ferguson, proprietor of the goods, for the price.

Part of these spirits was seized by the revenue-officers; but the remainder came safe into the hands of the purchasers, who afterwards refused payment of the price.—Ferguson indorsed to trustees the obligatory missive, and they brought an action upon it against the purchasers before the admiral, which was carried into the court of session by advocacy. The purchasers contended, that, at any rate, they were only liable for the price of what spirits they had received; but, *separatim*,

Pleaded in defence against payment of any part of the price: Foreign brandy is prohibited, by the revenue statutes, to be imported in small casks, under the penalty of forfeiture to the crown. The goods, in the present case, falling within the enactment of these statutes, were imported into this country, and had incurred forfeiture before they were sold to the defenders.—Previous to the sale, the vessel with the prohibited goods on board, had come into Clanyard-bay, which is within

in the limits of a port.—This is held in law to be an act of importation, as much as if the goods had been landed on shore; and the revenue officers were entitled to have seized them on board of the ship as forfeited by law.

In every instance where goods are smuggled, the property of them vests in the crown from the time of committing the offence, and not merely from the time of seizure or condemnation. This necessarily excludes all kind of commerce in the goods smuggled.—The holder of them cannot transfer the property to the purchaser.—Any sale made by him flows *a non domino*, and the crown could seize the goods, though in the hands of a *bona fide* purchaser.

But, at whatever time the property of smuggled goods vests in the crown, if both parties are in the full knowledge that the subject sold was smuggled, the sale is a contract *super re illicita*; and no action can be given to purchaser or seller for implement of the contract.—All traffick of this kind is considered by the law as criminal. Severe penalties are enacted by statute against those who knowingly offer prohibited goods to sale, or knowingly purchase them, 11th Geo. III. c. 30. § 18.

It is of no consequence, therefore, that the importing of such goods is not a moral wrong in itself.—When, by the act of the legislature, the public revenue is fixed, and smuggling prohibited, it is thereby rendered criminal; and the defrauding the King of his revenues is to be considered thereafter as a moral wrong, as much as the defrauding an individual of his property.

The court have repeatedly found, that no action lies at the instance of a buyer against a seller for delivery of smuggled goods, nor for damages on account of the non-performance of any smuggling contract; Scougle and Young against Gilchrist, 16th November 1736; Cockburn against Grants, 2d November 1741; Duncan against Thomson, 1766.

In the present case, there was not merely a sale of goods knowing them to be smuggled, but a joint adventure, where both parties were equally concerned in defrauding the crown of its revenue.

Answered for the pursuer: Goods, on being smuggled, do not vest *ipso facto* in the crown.—In no case of forfeiture whatever has the crown any real right in the effects from the time of committing the offence, unless the statute enacting the forfeiture declares, that it shall draw back to that period.—If this is not expressly provided, the property remains with the holder, and does not vest in the crown until condemnation, or at least till seizure.

The revenue statutes contain no declaration, that the forfeiture is to draw back to the time of smuggling.—They plainly intimate the contrary.—The words of these statutes are, ‘ That the goods shall be forfeited.’ Although, therefore, goods are liable to forfeiture by being smuggled, they remain *in commercio*, and are the property of the holders until they are condemned, or at least seized by the crown officers.—The contrary doctrine is not supported by any authority from the law of this country, or the law of England.—But, in the present case, there is no room for this question, At what time the goods were forfeited. As they never were condemned in the court of exchequer,

they cannot be considered by this court as forfeited now, or at any other time.

The knowledge of parties, that the goods sold were smuggled, is no defence against payment of the price.

Foreign brandy is the subject of commerce in this country as much as any other article of trade: and, although smuggled into the country, yet, as long as the goods remain the property of the private party, and are not put *extra commercium* by seizure and condemnation, the sale of them is lawful.

The offence in the case of smuggling is entirely *malum prohibitum*. By importing foreign brandy in small casks, no moral wrong is committed, and the criminality of the importer arises solely from transgressing a statutory prohibition. The only penalties or forfeitures, therefore, which can be inflicted by judges on the offence, are those which the statutes have enacted.—This is the rule of law in every case where a trespass is declared by statute.—If it is meant that any contract or transaction betwixt the parties should be voided, over and above other penalties, it is so declared in the statute. The legislature thought this expedient in the case of game debts; and, accordingly, the obligation of debt is declared expressly to be voided by the act 9th Anne, c. 13. But, on the other hand, although members of the court are, by act 1594, c. 216. expressly prohibited from purchasing *pleas* and penalties annexed to the offence; yet, as the statute does not go further, and declares the transaction itself to be annulled, it is a fixed point, that the sale of the plea is good.—Among the many revenue statutes enacting forfeitures and penalties, no statute is to be found declaring, that persons selling smuggled goods shall forfeit to the purchaser the price of the goods sold and delivered to him.—From this, it may be concluded, that the legislature has purposely avoided that mode of correcting the evil as dangerous to the freedom of commerce.

The decisions founded on do not apply. In these cases, action was brought for implement of contracts to furnish smuggled goods. The pursuer, therefore, was demanding performance of an unlawful act, which could not be enforced by the court.—But the payment of the price for goods delivered, is an act of common justice, and, therefore, it cannot be unlawful to demand it.—In one of these cases, Cockburn against Grants, for delivery of run goods, Lord Kilkerran observes, that, ‘ where they are sold and delivered, it was not doubted that there ‘ lay action for the price.’ Accordingly, in every case where such action has been brought, it has been sustained; Commissioners of the customs against Morrison, 27th November 1723, Rem. Dec. where action was sustained for the price, although the goods were seized before delivery; Wilkie against McNeil, 6th November 1740, Home; Drummond against Yule, July 1743, Bank. b. 1. t. 19. § 17.; Walker against Falconer, 27th February 1757, Fac. col.

The court were of opinion, That, in this case, it was not necessary to determine the point, at what time smuggled goods are put *extra commercium*, and vested in the crown, as, from the other circumstances, there

there was sufficient ground for holding the transaction to be unlawful.

The judgment was, ' Find no action lies on the note in question,
' and assoilzie the defenders.'

A reclaiming petition for the pursuers was refused without answers.

Lord Ordinary, *Auchinleck*.
Clerk, *Tait*.

A&R. *Rae, G. Wallace*.

Alt. *Cullen*.

No. LXXIV.

March 2. 1779.

J O H N L E S L I E of *Balquhain*,

Against

D A V I D O R M E.

Tailzie.—Powers of the heir in granting leases.

IN 1692, Patrick Leslie executed an entail of his estate of Balquhain in favour of his second son, and a series of heirs in succession.—This deed contained a prohibition on the heirs of entail to grant leases below the former rental; but the entailer afterwards, by a new deed, revoked this prohibition, and allowed the heirs to grant tacks below the rental. Under this entail, the estate of Balquhain was held successively by the institute George Leslie and his two sons.—Upon the death of the youngest, the succession opened to Antonius Count Leslie, who entered into possession.

Patrick Leslie Grant, the next protestant heir of tailzie, brought an action for setting aside the right of Count Antonius to the estate, on the ground of his being an alien. This process continued in court several years, and was attended with considerable expence to the pursuer, the greatest part of which was advanced by Mr Orme, his agent, who had likewise expended money on Leslie's maintenance and education. The pursuer, in the end, prevailed both in this court and in the house of Lords.

After the judgment of that house, Leslie, upon a settlement of accmpts, granted two bonds to Orme for the amount of the whole of his advances, together with a gratuity for his trouble and risk.

He afterwards executed various deeds in favour of Orme, in order to secure his payment. The first of these was a lease (25th April 1765) for nineteen years, of the whole estate of Balquhain, for which Orme became bound to pay a rent of L. 300 yearly, and to apply what further

ther should be received from the subtenants, after deducing the expence of management, towards the extinction of Leslie's debts.

In 1769, this lease was discharged by both parties; and, for the better security of Orme, a new lease of the estate was granted in his favour for the space of four times nineteen years, at the rent which the lands then paid, amounting to L. 755 Sterling.—Orme, on the other part, agreed to deduce from the debt due by Mr Leslie the amount of a grassum, which had been previously calculated by an accomptant, as suitable to the value of the lease.—There is also a clause in this lease, relieving Orme of all further augmentations of stipends or schoolmaster's salaries, and of the expence of building and repairing kirks, manes, &c. and also of the rogue, bridge, and road-money.

Of the same debt, Leslie gave bond of corroboration to Orme for the balance due to him, after deduction of the grassum.—For the payment and security of this and his other debts, he likewise executed in favour of Orme, a trust-disposition of the whole tack-duty during the lease, excepting L. 300, payable annually to himself; and in case any of the heirs should refuse to ratify the deed, the tack-duty is restricted to the same sum, until such time as the whole debts should be paid.—Leslie afterwards executed new deeds in Orme's favour. By one of these, August 1769, a privilege reserved in the former lease to him, his heirs, and assignees, of assuming possession of the mansion-house and mains, is limited to him and his heirs.—By another deed, September 1773, Leslie further restricts his privilege to the *heirs-male of his body*.—He likewise, (September 1773), upon receiving a small grassum, lets to Orme the whole estate for other nineteen years, after expiry of the four nineteen years. All the deeds were afterwards ratified by Patrick Duguid, next heir of entail.

Leslie having died without issue, the succession devolved upon Patrick Duguid, who raised a process of reduction for setting aside the whole deeds above mentioned, granted by Leslie to Orme. After Patrick's death, John Duguid, his son, and next heir, insisted on this process, on two separate grounds, *1mo*, That, in the deeds under reduction, an undue advantage had been taken of the granter. *2do*, That they were null and void, as being *ultra vires* of Leslie, who held the estate under a strict entail.—On the last of these grounds,

Pleaded for the pursuer: 1mo, By the entail of Balquhain, it is rendered unlawful for the persons called to the succession, 'to sell, anailzie, or dispoise the lands, &c.' The expressions *anailzie* and *alienate* are not technical words, appropriated to signify a deed conceived in a particular form.—Whether a deed is to be considered as an alienation or not, must depend on the substance and extent of the right conveyed. The leases to Mr Orme for five times nineteen years alienated the estate as much as if the defender's right had been completed in the feudal form. In some respects they took away more from the heir of tailzie than if a perpetual right had been granted; for the heirs of tailzie were burdened with the augmentations of stipends, and other taxes above mentioned.—In substance, these leases resolved into a sale of the estate for an annuity out of it,

A lease

A lease of extraordinary endurance is held by the writers on the law to be an alienation : *Craig, lib. 3. dieg. 3. § 26.* Stair, b. 2. t. 2. § 13. Sir G. M'Kenzie, in his observations on act 1621, which prohibits *alienations* by debtors in defraud of creditors, takes notice, that the act was interpreted, as extending 'to *tacks* let by the debtor to the prejudice of his creditors.' In a reduction on the head of death-bed, a tack for three times nineteen years, was held to be a species of alienation by the court, and set aside ; *Christieson against Ker*, December 1733 ; *Dict. v. Deathbed*.

The consequences of a contrary doctrine would lead to the annihilation of many old entails. They seldom contain any restrictions with regard to the endurance of the leases, to be granted by the heirs, long leases being then unknown.

On the same ground that a prohibition to alienate is supposed not to restrain the heir as to the endurance of the lease, it can have no effect to restrain him as to the *quantum* of rent to be stipulated. The word *alienate* reaches to both, or neither.—Were the latter construction to be put upon it, the heir of entail in possession might reduce the right of all the succeeding heirs to a shadow, and effectually alienate the estate, provided only he does not execute the conveyance according to the feudal forms.

But, if the clause in the entail of *Balquhain* is not sufficient to restrain the heirs of tailzie from granting leases, though of the longest endurance, no clause whatever could answer this purpose ; and an express prohibition in the deed *not to grant long leases*, would be ineffectual against the lessees.

The maker of a settlement is no doubt considered, in the act 1685, as entitled to insert any provisions into it he chooses ; and these will be binding on heirs who succeed under the settlement. But it is not by this act made lawful for the entailer, by irritant and resolute clauses, to render all such provisions effectual against creditors and third parties transacting with the heir.—These clauses can only be applied with effect in the case of *prohibitions* 'to sell, anailzie, or dispo-
' 'pone the lands, or any part thereof, or contract debts, or do any
' 'other deed whereby the same may be apprised, adjudged, or evic-
' 'ted,' &c. The clause in the entail of *Balquhain* is expressed in the very words of the statute. If it is not held to strike against leases, even of the longest endurance, it follows, that the statute does not authorise the inserting irritant and resolute clauses in the case of any prohibition to grant such leases : Consequently, the prohibition, though in terms ever so explicit, not being supported by the statute, would be ineffectual against singular successors.—Thus an end might be put to all entails, as there would be no means by which a lease, flowing from an heir of entail, though for any length of time, and at any rent, however low, could be rendered ineffectual against the lessee.

The last of these leases is likewise *ultra vires* of the heir, on another ground ; for he can have no power to anticipate the administration of his estate at so distant a period as 76 years, and grant a lease of it to commence then.

In all events, the lease must be reduced, in so far as respecting the mansion-house, gardens, &c. It is understood, that heirs of entail have not the power of letting the mansion-house, by which they might exclude all succeeding heirs from residing upon their own estates ; and this was expressly found by the court, Lord Cathcart against Stewart Nicolson Shaw, 31st January 1755.

2do, The assignation to the surplus rents of Balquhain, after allowing an annuity to the heir, was *ultra vires* of the granter, and could only be effectual during his life.—The whole debts for which it was granted, were due by Leslie, and contracted on his faith singly. Any deed by him, appropriating the rents of Balquhain to payment of his own debt, ceased at his death.

Answered for the defender : 1mo, A lease is merely a personal contract, which supposes the property of the subject to be constantly vested in the granter, whether it is for a long or a short term of years. Consequently, a lease of any endurance is not an alienation of the subject ; for the property of it can never be in the lessee from the nature of his right.

The authorities founded on do not apply. In some branches of law, where the same strictness of interpretation is not required, as in tailzies, a lease of long endurance may be considered in the same light with an alienation of the subject, and held to be implied under it. But it is an established principle, that, in tailzies, limitations on the heirs cannot be implied.—It is not enough that the act challenged should be equally prejudicial to the heir as that prohibited. If there are not words in the entail expressly discharging the act, third parties transacting with the heir are in safety.

It is no reason for holding long tacks to be a species of alienation, that, otherwise, an express prohibition to grant such tacks in the deed of entail would be ineffectual. This only shows, that the law is defective in not expressly allowing tailzies to be made, with clauses prohibiting long tacks to be granted. But, if a long tack is not *in law* an alienation, the court cannot supply the defect in the statute, whatever the consequences of it may be.

The lease for the additional nineteen years is in no different situation from the other.—Though it is granted by a new deed, it is clearly nothing more than a prorogation of the former lease.

2do, it was not *ultra vires* of the heir of entail to grant the assignation challenged.—If the heir had chosen it, he might have gone farther ; and, by letting the lands for the same length of time, at a low rent, obtained large grassums, instantly advanced, with which the debts could have been paid off.

The greater part of these debts were contracted for the benefit of the pursuers, and the whole subsequent heirs of entail, as it was by means of the process in which they were incurred, that the present line of heirs came to be entitled to the succession.

The judgment of the court was, *Find*, ‘ That the insisting in a reduction of the tack dated the 5th April 1765, was inept and incompetent, and assilzie the defender from that conclusion ‘
‘ fion

‘ fion of the purfuer’s fummons. *Repel* the reasons of reduction of the tack granted by Peter Leslie-Grant to the said David Orme, dated the 29th March 1769. *Repel* the reasons of reduction to the obligation and assignation, dated the 29th March 1679, in so far as respects the restriction of the tack-duty, and assignment of the surplus over and above the L. 300, during the lifetime of the said Peter Leslie-Grant, and of the purfuer’s father ; but *sustain* the reasons of reduction thereof, in so far as regards the restriction and assignment of the tack-duty of all years from and after the death of the purfuer’s father. *Repel* the reasons of reduction of the ratification by the purfuer’s father, in so far as regards the tack itself, and the restriction of the tack-duty, and assignment of the surplus thereof, for the purposes therein mentioned, during the lifetime of the purfuer’s father, after his succession to the estate of Balquhain ; but *sustain* the reasons of reduction *quoad ultra*. *Sustain* the reasons of reduction of the deed of restriction granted by the said Peter Leslie-Grant to the said David Orme, dated the 5th day of August 1769 years ; and of the tack and deed of restriction, granted by the said Peter Leslie-Grant to the said David Orme, dated the 7th day of September 1773 ; and also of the tack granted by the said Peter Leslie-Grant to the said David Orme, dated the 11th day of September 1773.

Lord Ordinary, Covington.
Clerk, Robertson.

Act. Lord Advocate, Alt. D. Graeme, Crossbie,
M^r Laurin, Blair. Armstrong, Ferguson.

No. LXXV.

March 2. 1779.

J O H N S T R E T T E L,

Against

J A M E S P O T T S.

Annualrent.—Interest on Merchants Accompts.

IN 1763, James Potts and John Elliot engaged in a company trade at Quebec, and commissioned from John Strettel merchant in London different articles, for which it was agreed that they should have nine months credit from the time of furnishing.—This company turned out unsuccessful, and Potts and Elliot were obliged to leave off trade ; at which time they were in considerable arrear to Strettel.—Potts having returned to Scotland, his native country, Stret-
tel

tel brought an action against him for payment of L. 498, as the balance due by the company. In the state of accompts made up by the pursuer, from which this balance was struck, he had charged interest upon the goods furnished, from the period of nine months after they were shipped, and had applied the remittances from Potts and Elliot at the time of receiving them to the extinction of these interests in the first place, and the remainder only to extinction of the price.

Objected by the defender to this mode of stating the accompts: When a debt is constituted by bond or bill, it is no doubt the rule of law, that partial payments must be applied to extinction of the interest before they can affect the capital sum.—But, in the case of mercantile accompts, a different method is followed, both in this country and in England, where the transaction took place, and by the law of which, therefore, the question ought to be determined. The partial payment is, at the time when received, applied to extinction of the capital, and interest is charged thereafter only on such part of the capital as remains after deduction of that payment. The interests are kept in a separate column, until the accomp is finally closed, when they are added to the principal sums.

Merchants adopt this method of settling accompts for an obvious reason.—If they were to apply the partial payments to extinction of interest in the first place, their correspondents would have no encouragement to make remittances. They would be losers by remitting; for, if they keep the money in their own hands, they would have the use of it until they were able to pay off the whole accomp, when the merchant would only be entitled to his principal and interest from the time it fell due.

Answered for the pursuer: There is no solid distinction betwixt payments made on mercantile accompts, and those made on other debts by bond or bill.—After the nine months for which credit was stipulated, the pursuer was equally entitled to interest on the price of the goods, as if he had taken a bond for the price.—The pursuer deals only in buying and selling on commission, and he purchased with his own money the goods sent to this company.—The interest of that money he would have received yearly, if it had not been bestowed in this manner; and, therefore, justice would not be done him, if the partial payments were not allowed to be applied, at the time they were made, to the extinction of the interest.

As fourteen years have elapsed since the goods were furnished, the delay of payment is an additional reason for stating the partial payments to the extinction of interests.—The pursuer likewise alledged, that the practice of merchants was in his favour.

As parties differed in their averments with regard to practice, the court 'allowed either party to procure proper certificates in England, 'of the usual mode of stating accompts, such as these in question, 'and periods of imputing the partial payments, and interest on the 'whole.' Certificates from merchants were produced by both parties.

The

The court were of opinion, That no authority or practice had been shown to alter the fixed rule of law, and ‘repelled the objection to the stating of the accompts.’

Lord Ordinary, *Justice Clerk.*
Clerk, *Campbell.*

A&C. *N. Ferguson.*

Alt. *Wight.*

No. LXXVI.

March 9. 1779.

M A R Y R U S S E L, and others,

Against

J O H N R U S S E L.

Conquest.

RUSSEL of Arns, in his son William Russel's contract of marriage, disposed the lands of Arns to his son, and the heirs of the marriage. On the other part, the son obliged himself to take the rights and securities of the whole heritable and moveable conquest which he should acquire during the subsistence of the marriage to himself, and the heirs thereof; which failing, to his own heirs and assignees. The marriage dissolved by the predecease of the wife, leaving issue two sons and four daughters. Both the sons, and one of the daughters, died without issue.

During the subsistence of the marriage, William Russel purchased some heritable subjects, and sold them *after* his wife's death. Subsequent to this sale, he executed a deed, by which he disposed his lands of Arns, and his whole effects whatever, to Agnes, his second daughter, in liferent, and to John Spiers, her second son, in fee, under burden of certain legacies to his other daughters. The deed declared, that these legacies should be in full satisfaction to them of all they could claim by their mother's contract of marriage.

Agnes predeceased her father, leaving several sons and daughters.

After the father's death, an action was brought by his eldest daughter Mary, and third daughter Jean Russel, for setting aside his settlement on John Spiers, and the other children of Agnes, as *ultra vires* of the granter; and for having it declared, that the pursuers were entitled to succeed to the real and personal estate of their father, in terms of the contract of marriage.—The court had no doubt in determining that this settlement on the second son of the second daughter, which excluded the whole heirs of provision, was *ultra vires* of the granter, and that the succession to the subjects must be regulated

ted by the contract of marriage.—The lands of Arns, therefore, which were *specialy* provided to the heirs of the marriage, devolved, without dispute, on the pursuers, (the two surviving daughters), and on the eldest son of Agnes, the predeceasing daughter, being the heirs-portioners.—As the conquest was likewise provided to the *heirs of the marriage*, the lands conquest descended to the same persons. But it was disputed betwixt the parties, who were the persons under the marriage-contract entitled to take up the succession of the conquest moveables.

The pursuers insisted that the moveables ought to be divided betwixt them, as nearest in kin, exclusive of the children of Agnes, there being no right of representation in succession to moveables.—The defenders contended, that, as the succession to the moveables in this case went to heirs of provision, and not to heirs *ab intestato*, it could only be taken up by service, and the *jus representationis* must take place. This general point was argued by the parties, but received no judgment; the necessity of deciding upon it in the present case being removed by the following speciality; that, though there was a moveable estate left by the father at the time of his death, this estate, *ex concessis*, arose solely from the sale of the conquest lands by the father after the dissolution of the marriage. On this ground,

Pleaded, separatim, for the defenders: That it is needless to inquire, who is the heir in the moveable conquest; for the whole of it must go to the heirs in the heritable conquest.—The father, no doubt, during the existence of the marriage, might have changed heritable subjects into moveable, and moveable into heritable, at his pleasure. But the dissolution of the marriage, by the predecease of the wife, fixes not only the *quantum* of conquest, but what particular subjects the respective heirs of the marriage are entitled to succeed to.—The heirs in heritage having right to succeed to such subjects as are then heritable, and the heir *in mobilibus* to such as are then moveable.

The dissolution of the marriage has the same effect as if special subjects had, from the beginning, been settled on these heirs by the marriage-contract. They have, from that period, a proper *jus crediti*; and, although they cannot insist for immediate possession of the subjects, yet, if the father dissipates the conquest, he is liable in warrandice. A sale of the subject made by him is valid to the purchaser; but he is bound to make good the damages suffered by that heir of provision who is hurt by the sale, and who would otherwise have succeeded to the estate.

If a subject, therefore, which was heritable at the dissolution of the marriage, is afterwards sold by the father, as in the present case, the heir in heritage is entitled, when insisting after the father's death for implement of his provision, to have the price or value of such estate refunded to him out of the father's moveable or other subjects.

Answered for the pursuers: A provision of conquest has not, at any time during the life of the father, the same effect as a special provision.—It is considered as little better than a simple destination. The dissolution of the marriage fixes the *quantum* of the conquest in this respect,

respect, that the children can claim nothing acquired after that period ; but the ample fee of the subject remains in the father. It is observed by Ersk. b. 3. t. 8. § 43. ‘ That the conquest is computed *quoad* the father, not as at the time of the dissolution of the marriage, but of the father’s death ; November 27. 1684, Anderson ; February 24. 1685, Cruickshanks, Fount.’

But, although the dissolution of the marriage should be considered as fixing in general the *quantum* of the conquest, which the father is bound to transmit to the heirs of provision, it does not give an heir of conquest the *jus crediti*, which an heir of provision, in a special subject, is entitled to. In that case, the father being obliged to transmit a particular subject, if it is sold, or in danger of being carried off, the heir may, even during the father’s life, do diligence, or bring an action against him for making the provision effectual in the event of his death. —But, in the provision of conquest, the father comes under no obligation to transmit any particular subject ; and, therefore, if the conquest consist of a land-estate, the heir has no *jus crediti* from the marriage-contract to insist that this land-estate shall descend to him. The obligation of the marriage-contract is fulfilled, if the whole value of the conquest at the time of the dissolution of the marriage goes either to the heir in heritable, or to the heir in moveable subjects conquest ; and the father is always entitled, during his life, to vest his property in subjects of the one kind or the other, as he chooses.

The court found, ‘ That Robert Spiers, eldest son of Agnes Ruffel, has right to the same share of the conquest provided by William Ruffel’s contract of marriage that Agnes would have had, had she been alive ; and remit to the Lord Ordinary to proceed accordingly.’

Lord Ordinary, *Covington.*
Clerk, *Campbell.*

Aff. D. Rat, *W. Bailie.*

Alt. *M^cLaurin.*

No. LXXVII.

June 16. 1779.

ANGUS CHRISTIAN,

Against

JOHN SYME.

College of Justice.

THE magistrates of the Canongate are entitled, by an act of parliament in 1663, to exact an annuity for the maintenance of a minister

imnister from the possessors of all tenements within that borough.—John Syme writer to the signet, possessor of a house in the Canongate, having refused to submit to this exaction, the collector of the fund pursued him before the bailies of the Canongate for payment of the annuity.

In defence, Mr Syme contended, that he was excoemed from this taxation by his privilege as a member of the college of justice.—The bailies pronounced the following interlocutor: ‘ Having considered the libel and defence, with the act of parliament imposing the annuity in question, in respect the said act imposes the said annuity, without exception of any person or persons, of whatever degree, quality or place, upon pretence of any privilege or pretext whatever: Repell the defence, and decern.’ The defender afterwards brought the cause into this court by advocacy, and

Pleaded in support of his defence: The act 1537, c. 68. gives an express exemption to the Lords of Session ‘ fra all paying of taxes, contributions, and either extraordinar charges to be uplifted in ony time coming.’ This privilege was extended to the whole college of justice by act 1661, c. 23. And the act mentions the reason to have been, ‘ because the saids persons *must await daily* upon our said session, except at feriate times, and therefore should be privileged.’

These statutes seem to import an exemption to the privileged persons from such assessments in every part of the kingdom. But, at least, they give an exemption from the taxes of the place where the court is held, and where the members daily attending it reside.

The Canongate is the residence of many of those members who attend the business of court.—As, therefore, the inductive cause of granting the exemption applies not merely to Edinburgh, but likewise to the Canongate, those members of the court who reside in either of these places, are equally entitled to the privilege. Accordingly, the magistrates of the Canongate have never pretended to exact the impost exigible on wines and other liquors from members of the college of justice residing there.

Answered for the pursuer: The exemption from taxes given to the college of justice is regulated as to its extent by the immemorial usage.—It is now explained by that practice, to be nothing more than an immunity from all annuities and taxations due to the town of Edinburgh.

Impost is not exacted from the members of the court residing in the Canongate, because it is levied by the magistrates of that borough, not for their own use, but for the use of the town of Edinburgh, to the magistrates of which they are, by statute, accountable. But the annuity in question is levied for purposes within the borough of Canongate, and has been constantly exacted from every member of the court residing there, without any opposition, till now.

At any rate, whatever interpretation is put on the ancient statutes conferring this privilege, the act 1663 derogated from these statutes, and, so far as concerns the annuity in question, bars any plea founded upon them. The words of the act imposing the annuity are explicit: ‘ Without exception or exemption of any house, of what-
foever

‘ soever nature or holding the same be of, or of *any person or persons,*
 ‘ of *whatsoever degree, quality, or place,* upon pretence of any *privi-*
 ‘ *lege* or pretext whatsoever.

The court ‘ remitted the cause to the bailies *simpliciter.*’

Lord Ordinary, *Stonefield.*
 Clerk, *Menzies.*

A&A. *Rae.*

Alt. *Dalziel.*

No. LXXVIII.

June 23. 1779.

MARGARET PORTERFIELD,

Against

ELIZABETH GRAHAME, and others.

Fiar.

DOCTOR William Porterfield executed a deed, by which he assign-
 ed over to his only child Margaret Porterfield, (wife to Mr
 Grahame of Gartmore), in liferent, and to the heirs of her body in
 fee, certain bonds, and the interest remaining due upon them at the
 time of his death.—This deed contained the following clause: ‘ With
 ‘ full power to my said daughter, and her foresaids, for their respec-
 ‘ tive interests above mentioned, after my decease, to uplift and re-
 ‘ ceive the foresaid sums of money; and, if need be, to sue therefor,
 ‘ and to grant discharges of the same, which shall be sufficient to the
 ‘ receivers; and, generally, to do every thing in the premises which
 ‘ I could have done in my life. But declaring always, that these pre-
 ‘ sents are granted by me, and to be accepted of by the said Margaret
 ‘ Porterfield, with the burden of the payment of my just and lawful
 ‘ debts, and funeral charges, and all legacies that shall happen to be
 ‘ left by me at my death.’

Mrs Grahame, at the time when this settlement was executed, had
 issue one child, a daughter, and, before her father’s death, had other two
 children, likewise daughters.—She survived both her father and her
 husband.—After her husband’s death, a doubt arose upon the con-
 struction of the above mentioned deed, whether the fee of the sums
 thereby conveyed was in the mother or in the daughters; and this ques-
 tion was tried in a multiple-poining brought for that purpose, at the
 instance of a debtor in one of the bonds.

Pleaded for the mother: It appears, from several parts in this deed,
 as well as the clause of destination, that the intention of the father was
 to give his daughter the absolute disposal of the money.—She is, by
 the deed, entitled to uplift, to sue for, and to discharge the sums in

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the

the bonds conveyed.—These are the powers of a fiar, and inconsistent with the mere right of liferent.—She is subjected to the payment of the granter's debts, funeral charges, and legacies ;—burdens which can, with no propriety, be laid on a liferenter. These circumstances evidently discover the purpose of the father to give his daughter the fee of the subject. Though it were doubtful, therefore, what was the legal meaning of the words in the destination, the intention of the granter, apparent from the other parts of the deed, would regulate the interpretation which they ought to receive.

But the legal import of this conveyance ' to the daughter in life-rent, and to the heirs of her body in fee,' is to vest the fee in the mother. This point has been determined in cases where the destination was in similar terms ; Frog against his creditors, 25th November 1735 ; Home, Lilly against Riddel, 24th February 1741 ; Kilk. v. Fiar, Douglas against Ainsly, 7th July 1761 ; Dict. of Decis. vol. 3. v. Fiar.—On the faith of these decisions, and the general practice, settlements are daily drawn up by conveyancers in this form of words, when the party intends to give the absolute disposal of the subject to the person nominally in the right of liferent. A seeming impropriety of language cannot be opposed to what has been thus generally understood by the country as the import of these words.

Answered for the children : The terms of liferent and fee have each a separate signification, totally distinct the one from the other ; and, to maintain, that the fee is conveyed by a mere grant of the liferent, involves a contradiction in terms.—In the case of land-estates, it has indeed been found, that, where the estate is conveyed to a person in liferent, and his heirs *nascituri* in fee, the fee must vest in the person provided to the liferent. But these decisions are founded on a mere subtilty in the feudal law :—That the fee of the feudal subject cannot be *in pendente*.—There does not seem to be very solid ground for this doctrine, even in the case of feudal subjects ; Ersk. b. 2. t. 1. § 3. But, when moveable subjects are conveyed in these terms, the principle does not apply.—There is nothing to hinder the property of such subjects to be *in pendente* ; and, therefore, there is no reason for constructing the liferent into a fee. The obvious meaning of the words must govern the rights of the different parties in the subjects conveyed ; and it has been so found in the case of moveable subjects, Turnbull against Turnbull, July 28. 1778.

That the granter used the words *liferent and fee* in the plain and natural meaning, as expressive of two distinct interests in the subject, is evident from these words of the deed : ' With full power to my said daughter, and her forefairs, *for their respective interests* above mentioned, after my decease, to uplift,' &c. It is here supposed, that his daughter had one interest, and her heirs another, at the time of his death.

The court found, ' That the fee of the bond in question is vested
' in Mrs Grahame the mother.'

Lord Ordinary, *Kames*.
Clerk, *Campbell*.

A^d. *Wight*.

Alt. *M'Laurin*.

No.

No. LXXIX.

June 24. 1779.

JOHN WOOD,

Against

HELEN GRANGER.

Foreign.—Interest.—Costs of suit.

DOCTOR James Granger, after residing in the Island of St Christophers, died there in 1767; upon which his widow and her daughter Helen Granger, came over to England.

In 1772, John Wood merchant in St Christophers obtained a judgment of the court of King's Bench in that island against Granger's executors for L. 60 currency, due by Granger to him, with costs.—Afterwards Wood brought an action in the court of session against Helen Granger, only surviving child of the Doctor, as representing her father, for payment of this sum, with interest, at the rate of St Christophers, from the date of the furnishing; and likewise of the sum of L. 17 as the costs of suit, with interest from the time they were expended.

Pleaded in defence against this action: 1mo, No interest ought to be found due, as none is decreed for by the judgment of the court at St Christopher's, which is the ground of the action.—But, at any rate, no higher rate of interest will be allowed than what the law permits to be taken in this country.—So it was found, even where the higher interests of the foreign country were stipulated by bond; Savage against Craig, January 27. 1710, Fount.

2do, Neither are any costs due; for, although the judgment is 'for the sum of L. 60, with costs,' no account was given in, or modified by the court at St Christophers, and consequently they cannot be decreed for by this court.

Answered for the pursuer to the first objection: In all countries merchants are entitled to interest *nomine damni* on sums due to them in the course of trade, though not expressly stipulated.—It is a consequence of the principles of equity which entitle the merchant to interest, that the law of the country where the debt is contracted, and where it is payable, ought to regulate the interest; for, otherwise, the merchant is overpaid or not indemnified.

In St. Christophers, the interest of money is higher than in this country.—The debt in question was contracted and payable in that island. Had it been actually paid, when due, to the pursuer, who resided there, he could have reaped the same advantage from it as the other inhabitants do from money lent out. Consequently, he is not indemnified,

indemnified, unless he is allowed the legal and common rate of interest at St Christophers.

2do, As to the costs, it was said not to be customary for the court in that island to modify the costs; but a certificate was produced from the solicitor-general there, bearing that they were charged according to the custom of the place.

The court found ' the defender liable in payment to the pursuer of
' the sum of L. 60, currency of St Christophers, with the interest
' thereof at the rate of this kingdom, from the date of the citation in this process, till payment; but found no costs of suit
' nor expences due; and decerned.'

Lord Ordinary, *Alva.*
Clerk, *Orms.*

A&S. *Anstruther.*

Alt. M'Laurin.

No. LXXX.

June 24. 1779.

JAMES JACKSON,

Against

WILLIAM URE.

Police.—Post-office.

THE turnpike-acts for the roads leading to Glasgow contain the usual clause, declaring, that no toll shall be demanded ' for any post-horse carrying the mail or packet.' Under the cover of this exemption, private persons sending expresses on their own business, had been in use to obtain a *dispatch express* from the post-office, who claimed an equal right to pass through the turnpikes without paying for his horse, as the post-boy carrying the public mail.

Several of these expresses dispatched from the post-office were stopped, and obliged to pay toll at a turnpike in the neighbourhood of the town. This produced an action before the sheriff, at the instance of the post-master, against the collector of the toll, for repetition of what had been paid, and for having it declared, that the collectors of the toll-duties cannot, in time coming, ' levy any tolls or portage from the horse carrying the mail or packet, or dispatches from or to the said post-office of Glasgow with an express mail or packet, in terms of the acts of parliament.'

In the course of the action, the sheriff ordained the defender to condescend, *imo* Upon the names and designations of the persons who were stopped, and interrupted in the manner mentioned in the libel.

libel. *2dly*, 'Specially to set forth, whether they were carrying the public
' mail or packet, which is regularly sent off at stated times, in the com-
' mon course of the post-office employment, or a packet dispatched by
' special expresses from the post-office, and whether such packet was a
' government or public packet, upon his majesty's service, or a private
' packet sent off at the instance of a private person in regard to private
' affairs.'

The pursuer having declined condescending in terms of the second part of the interlocutor, the sheriff assilzied the defenders, and the cause was brought into court by advocacy.

Pleaded for the pursuer: The words of the act exempting from toll the horse that carries the mail or packet, applies equally to mails that are dispatched occasionally, as to the regular established post. It is of no consequence, whether the dispatch goes upon the business of government, or of private individuals. The transmission is, in both cases, a matter of public service and police; and, if the dispatches in any of these different circumstances are sent agreeable to the regulations of the post-office, they are entitled to the exemption.

Answered for the defenders: The common post is established for the public utility, which is a good reason for the exception in its favour; but the act nowhere conferred on post-masters a power of exempting expresses on the private business of individuals from paying toll.—These exemptions differ in no respect from dispatches sent by a private messenger, except that the post-master lends the post-office seal, in order to give the rider the command of horses on the road to facilitate his progress.

The number of these expresses is now considerable; and, when private persons have occasion to send them, and to take the benefit of the public road, it is reasonable they should pay for it. This does not interfere with the accommodation afforded them by the post-office, of commanding horses on the road, which is by no means inconsistent with paying toll.

The court found, 'That toll-duties and postage were not exigible
' by the defenders for the horses dispatched with the mails, pac-
' kets, or expresses libelled; and therefore, found the defenders
' liable in repetition to the pursuer of the toll-duties and postages
' exacted by them for the said horses.'

Lord Ordinary, *Kennet*.
Clerk, *Menzies*.

A&C. Sol. General.

Alt. Cullen.

R r

No.

No. LXXXI.

June 25. 1779.

D A V I D P A T I L L O,

Against

Sir W I L L I A M M A X W E L L, and others.

Jurisdiction.

DAVID PATILLO, an inhabitant in the county of Dumfries, was (on the 13th May 1779) brought before a meeting of the commissioners for executing the comprehending act, 19. Geo. III. charged with being a disorderly person, following no employment, and, therefore, within the description of the act. This was denied by Patillo, who further insisted, that, at any rate, the act expressly prohibits enlisting any person in his circumstances, as he was above 50 years of age, and under the size required by the act.

The minutes of this meeting bear, that Patillo was examined by the justices; 'and evidence with respect to his character being called, ' was found to be a person falling within the description of the act, ' and was therefore adjudged to serve his Majesty in terms thereof: ' Being aged, as he says, but without producing any proof thereof, ' fifty or thereby. And he was accordingly delivered over to the officer appointed to receive him, according to the act of parliament; ' the said Patillo is four feet five inches high.' Patillo was forthwith sent to jail by the recruiting-officer; and he afterwards presented a bill of suspension and liberation from prison, on finding sufficient caution that he should again make his appearance, when the question as to the legality of these proceedings should receive the judgment of the court. In evidence of the fact that he was upwards of fifty, a certificate was produced of the date of his baptism from the kirk-session record.

The commissioners, in their answers to this bill, *objected*: That the court of session had no power to review their proceedings, and founded on two decisions as directly in point for their plea; Robertson against the justices of Stirlingshire, July 25. 1744; Foot and Marshall against Stewart, August 9. 1778.—On the question which ensued with regard to the court's jurisdiction, the same arguments were used by the parties as are stated in these decisions.—But the complainer further

Pleaded: That the decisions were not directly in point; and there were other grounds for having the proceedings under challenge reviewed by the court than occurred on the former occasions. The only objection made in these cases to the proceedings of the commissioners was,

was, that iniquity had been committed by their judgment, finding the complainer a disorderly person, coming under the description of the act. But in this case, the objection reaches to the jurisdiction of the commissioners, and does not rest merely on the sentence being iniquitous.—The statute sets out with describing those who may be lawfully comprehended, such as disorderly persons, smugglers, &c. But all of these descriptions are qualified with the following provision : ‘ Provided always, that no man be enlisted for his Majesty’s service, by virtue of this act, who shall appear, in the opinion of the commissioners, or officers appointed to receive such men, to be under the age of 16 years, or above the age of 50, or who, being under the age of 18 years, shall be under the size of five feet three inches without shoes, or, being above the age of 18, shall be under the size of five feet four inches without shoes.’

The act, therefore, excludes commissioners from exercising any jurisdiction over persons in the situation of the complainer, though the evidence were ever so clear that they came within the description of the act as disorderly persons. It does not merely give an exemption to men above fifty, or under size, from being made soldiers. The act prohibits enlisting them, even if they should be inclined to enlist ; and the commissioners are debarred from sending persons of that description into his Majesty’s service.

Answered for the commissioners : That the powers conferred by the statute on them are to take cognizance of, and to determine finally in every case where a man is brought before them, whether he ought to be adjudged as a soldier. Consequently they must have the same power of determining finally, whether he is of the age and size required by the statute, as of any of the other requisites necessary to bring him under the statute. There is, therefore, no solid distinction betwixt the present case and those formerly decided. But, further, the words of the act necessarily imply, that the commissioners had a jurisdiction in the present case ; for the persons that are not to be enlisted, are declared in the act to be such as, *in the opinion of the commissioners*, are above 50, or under the size mentioned in the statute.

The court, in general, were of opinion, that, although bills of this kind ought not to be passed, except where very good and sufficient reasons are shown ; yet their powers of reviewing the sentences of the commissioners, arising from their inherent and constitutional jurisdiction, were not excluded by this statute.

The court ‘ passed the bill.’

Lord Ordinary, *Ankerville*.
Clerk, ———.

A^d. *Crosbie*.

Alt. *M^r Laurin*.

No.

No. LXXXII.

June 30. 1779.

J A M E S G O O D,

Against

C H R I S T I A N S M I T H.

Compensation.

JAMES GOOD, in his own name, and as executor decerned *qua* nearest of kin to David Stoddart, brought a process against Christian Smith, executrix decerned to Henry Wilkinson, for an accompt of wright-work done by Stoddart and the pursuer to Wilkinson. The defender pleaded prescription on the act 1579; and it being disputed what part of these accompts was prescribed, it was found by a final judgment of the court (in 1776), 'That the accompts pursued for as due to Stoddart and Good fall under the statutory prescription, except *for three years* preceding the execution of the summons for payment of them.' An after question occurred relative to the application of certain partial payments made by Wilkinson to Stoddart within the period of three years preceding the execution of the summons.

Pleaded for the pursuer: In the case of an indefinite payment, the creditor is entitled to impute it to extinction of the debt worst secured. These partial payments, therefore, within the last three years, are not to be imputed in payment of the articles of the accompt for work done during that time.—The pursuer is entitled to apply them respectively to the oldest articles of the accompt, within three years previous to the date of each payment; Fleeming, January 6. 1565, Dict. of Decis. v. Indef. paym. Duck against Maxwell, June 28. 1717, Home.

No action could be sustained now on these older articles, because prescription has run; but, being good grounds of debt at the time the payments were made, they were sufficient to exhaust the payments so far as they went. On that account, the pursuer was under no necessity to bring an action for these articles within the years of prescription. He had the payments in his own hands to extinguish them.

Answered for the defender: The pursuer's argument proceeds on the hypothesis, that the payments made during the last three years were indefinite; but no payment can be held indefinite, unless it is established, in the *first* place, that there was more than one debt owing at the time.—In this case, the only debt which it is possible to show ever existed, was that owing for work performed during the last three years.

years. As to the other, supposed to arise from alleged articles of work performed previous to the three years, there is no room for evidence now of its ever having been due. The effect of the triennial prescription as to these articles, was to cut off every mean of proving their existence, except the writ or oath of the employer: Consequently, as he is dead, the payment must be applied to the work performed for the last three years, the only debt which is established to have been due when these payments were made.

But, in the applying of indefinite payments, it is the situation of the debt at the time of *demanding a settlement*, and not at the time of the *indefinite payment*, that is to be considered. Although, therefore, the older articles of the accompt were to be held another debt of Wilkinson's at the time of the payments; yet, as they were not then applied to the extinguishing of these articles by the parties, and this is only now required, it cannot be allowed. The supposed debt to which the payment is desired to be applied does not exist, and is as much at an end by the prescription, as if a discharge had been produced of it.—If the pursuer's plea were good, the defender would, in effect, be found liable in the prescribed part of the accompt; and it is evidently the same thing as if the action had been sustained against him directly for more than three years work.

The court found, ' That the partial payments made to Stoddart and
' the pursuers during the last three years of the accompts libelled,
' should be applied to the articles of these accompts, which were
' not prescribed at the time of such payments, but within three
' years of the date of such payments.

Lord Ordinary, *Justice Clerk.*
Clerk, *Menzies.*

Aff. J. *Dickson.*

Alt. *M. Laurin.*

No. LXXXIII.

June 30. 1779.

FRANCES BELSCHIER,

Against

ANDREW MOFFAT, and others.

Terce.

IN 1750, William Belschier having purchased the lands of Grange, including a valuable coal, disposed them to his wife Frances in life, and himself in fee, and the heirs-male of the marriage; but

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reserved power to sell the estate, or to burden it with debt, and to alter the destination at his own pleasure, without the wife's consent.—Infeftment was taken in name both of husband and wife on this disposition.

Belschier contracted considerable debts to George Thomson; and, for his security, disposed to him in 1769 the lands and coal of Grange, redeemable on payment of the debts. Upon this disposition, Thomson was infeft, and entered into possession. Afterwards a lease of the whole estate and coal, was granted by Belschier and Thomson jointly to Messrs Caddels, by which the rent was made payable to Thomson, until redemption of the lands.

Belschier died during the currency of this lease. His widow having expedite a service on a brief of terce, brought a process against Caddels, the tenants of the lands, for a third part of the rents since her husband's death, and in time coming. Thomson appeared in this process, and objected to her getting any terce out of that part of the rent payable for the coal. Having afterwards settled matters with the pursuer, he dropped his opposition. But the other creditors of Belschier, who had adjudged the lands after the death of their debtor, appeared, and

Objected to the widow's claim: I. By the statute 1681, c. 10. it is enacted, that, where a particular provision is granted by the husband to the wife, 'either in a contract of marriage, or in some other writ, before or after marriage,' the wife shall be thereby excluded from her terce, unless there be an express provision in the deed to the contrary.

The pursuer's husband, by the disposition 1750, provides her in a liferent of the lands burdened with his debts.—As she took infeftment on this disposition, and founded on the infeftment in her service to the terce, she must be held as having accepted of that special provision, and cannot insist for a terce.

II. It is a fixed principle, that the husband's infeftment regulates the widow's terce; and, whatever debts or deeds exclude his right at the time of his death, must likewise be preferable to the terce. By the disposition which Belschier granted to Thomson, he was effectually denuded of the whole estate; and Thomson was infeft and in possession of it previous to Belschier's death.

It is of no consequence that this right in favour of Thomson was redeemable. As the subject was not actually redeemed, the granter's infeftment was effectually excluded at the time of his death by the infeftment of the disponee; and that is sufficient to exclude the terce; Craig, l. 2. Dieg. 22. § 25. Balf. Pr. t. of Dowrie and Terce, c. 7. Stair, b. 2. t. 6. § 17.

Neither will it avail the pursuer that Thomson abstains from insisting in his preferable right to exclude her terce.—He suffers no loss by taking this course, except a delay of payment.—But the other creditors are entitled to insist, that he shall not give up his preferable right, but shall hold possession of the whole estate until he is completely paid, not only of interest, but of principal.—They will suffer a material prejudice, and their fund of payment must be, *pro tanto*, diminished, if these

these rents, which ought, *of right*, to be applied in extinction of the preferable debt, are gratuitously given away to the widow, and the preferable debt so much longer kept up against the estate.

III. But, although the widow were entitled to claim a terce out of the lands, *imo*, There is no terce due for that part of the rent which is given for the coal; so it has been found, *Lady Lamington against her Son*, 14th February 1728, Dic. v. *Liferenter*, Bankt. b. 2. t. 6. § 11.—Coal does not, like land, yield a perpetual rent.—It is part of the subject itself; and the lease of it is, in effect, a disposal of the property, in so far as the coal is worked and carried off by the lessee.

2do, The rents both of lands and coal are, in the first place, liable for the current interests of the preferable debts before any terce can be claimed. But, further, the preferable creditor cannot take the whole coal-rent for payment of his interests, in order to found the widow in a claim for her full terce out of the lands. The land-rent and the coal-rent, in this case, are to be considered as different estates, over both of which Thomson is preferable.—He must draw proportionably out of both; for it is an established rule, that, when a creditor is preferable on different subjects belonging to his debtor, he cannot use his preference arbitrarily, by favouring one creditor more than another, where his own interest is not concerned.

Answered for the widow: I. The object of the act 1681 was to provide against an error common in marriage-contracts, of omitting to declare, that the special provision secured to the wife was in place of the terce. But the disposition 1750 did not secure any provision to the wife, as it was burdened with the husband's debts, and the settlement on her alterable at his pleasure.—Had a settlement of this kind, which the husband could disappoint at pleasure, been inserted in a mutual contract, it would not have had the effect to bar the widow from insisting for her terce, if she preferred the legal to the conventional provision. But, as it was only provided in a deed by the husband, to which the wife was no party, nothing but an express acceptance of that settlement, in place of her terce, could have this effect.

In this case, there was no acceptance. The infeftment on the disposition gave her no security that the settlement would be made good.—Neither was the production of that infeftment to the inquest on her service an acceptance of the deed; it was only produced in order to ascertain the subjects in which her husband died infeft, and not the extent of her demand. On the contrary, she claimed the terce, and rejected the provision.

II. Thomson acquired nothing more by the disposition in his favour, than a right over the estate in security of his debt; and, therefore, his infeftment on that deed is consistent with the granter's infeftment of property. Dispositions of the lands themselves in security, are, by the present custom, inserted almost in every heritable bond.—But such dispositions are not to be held an alienation of the property; they only burden it. The pursuer's terce, therefore, is not excluded by Thomson's infeftment in security; the rents must, no doubt, be first applied to pay the yearly interests of the debt heritably secured.

But

But it is an established rule, that the widow's claim for her terce out of the residue, is preferable to that of the creditor for the capital sum.—In as far, therefore, as the rents exceed the payment of the yearly interest of Thomson's debt, terce is due by law; consequently, the plea of the defenders, that the preferable creditor has it in his power, and therefore ought to apply the whole rents to payment of his debt, both principal and interest, is evidently groundless.

III. The doctrine that coals cannot be the subject of terce, is only supported by a single decision. Lord Stair, who enumerates the various exceptions to the terce, takes no notice of coal-rent as an exception; Stair, b. 2. t. 6 § 16. But, at any rate, the preferable creditor is at liberty to take payment of his interests from the rent of coal, if he chooses; and other creditors, who are merely personal, have no title to insist on his taking payment of these from any other subjects.

The judgment of the court was, ' Find that Mrs Belschier's terce
' does not affect the rents or profits of the coal, but only those
' of the lands and teinds in which her husband died infest. *Find*,
' That Thomson, as well as any other real creditor, annualrenter,
' or annuitant, whose debts and annuities did really affect the
' estate, both land and coal, at the time of Mr Belschier's death,
' must take such annualrents and annuities proportionally from
' both, and cannot lay the whole upon any particular subject,
' leaving out the other, in prejudice either of the terce or poster-
' rior creditors; and, further, that their principal sums cannot be
' brought *in computo*, so as to hurt or diminish the terce; there-
' fore *find* the widow's terce to be one third part of the free rent
' of lands and teinds, after deduction of the above proportions of
' the interest of the real debts and annuities, if any be, affecting
' the same; and that such terce commenced and took place for
' the term's rent that became due at the next Whitfunday or Mar-
' tinmas after the husband's death.'

Note. By this judgment, the court found, that the teinds of the lands were subject to the terce, though this point was not argued by the parties, but only suggested by the court at the time of deciding the cause.

Lord Ordinary, *Kames*.
Clerk, *Campbell*.

A.G. *Sawinton*.

Alt. *Elphinstone*.

No.

No. LXXXIV.

July 1. 1779.

JAMES SCOTT,

Against

JOHN BRUCE-STEWART.

Prescription.—Union.

JAMES SCOTT of Scalloway brought a process of reduction, and declarator against John Bruce-Stewart of Symbister. The libel set forth, that the lands of Blosta, and others in Zetland, now in the possession of the defender, antiently belonged in property to the Sinclairs of Scalloway, and were by that family wadsetted, in 1667 and 1768, to Stewart of Bigton, from whom the defender derives his right.—That the pursuer was vested in the right of reversion which was in his authors, the Sinclairs of Scalloway. On these grounds, the action concludes, that the lands shall be declared redeemable, and the defender ordained to renounce and discharge his right over them, on receiving the money for which the lands were wadsetted.

In this action, the defender produced an absolute disposition in 1706, by Charles Stewart of Bigton to his son John Laurence-Stewart, of the lands in question, with seizin upon it in 1709. The defender contended, that these titles, with possession since that time, were sufficient to exclude the titles which the pursuer founded on, and to establish an absolute right to him in the lands by positive prescription.

Objected for the pursuer to the infeftment 1709: That it was not taken on any part of the grounds in question, but at the manor-place of Bigton, without other authority than a clause of dispensation in the disposition 1706, flowing from Charles Stewart, the granter of that deed.

No subject superior can create an union of lands lying naturally discontiguous, to the effect of making a seizin taken upon one part of them good for the whole: It is a branch of the royal prerogative. This was found, Aitken against Grinislaw, January 16. 1623, Durie.—It still continues to be the law, although if union is once established by the crown in favour of a vassal, it may, by that vassal, be communicated to his disponee; Stair, b. 2. t. 3. § 44; Bank. b. 2. t. 3. § 88.; Ersk. b. 2. t. 3. § 45. The seizin, in this case, therefore, not being taken on the ground of the lands as the law requires, is *intrinsically void*, and cannot be founded on as a title of prescription.

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Answered

Answered for the defender : It is laid down by Sir Thomas Craig, that nothing more than the act of the superior, whether the crown or the subject, is requisite to make an union, *L. 2. dieg. 7. § 17*. No reason can be assigned, why the right of dispensing with the feudal forms in this respect should be peculiar to the Sovereign. It is merely a consequence of superiority, and it is expedient that every superior should have the power to relieve his vassal in this particular, which is a matter of mere form.

But, although it were necessary that the dispensation should flow originally from the crown, it is admitted, that the benefit of a dispensation once conferred, may be legally communicated. Consequently, the objection to this seizin, even if made within 40 years, could have been removed by the production of a title, containing the crown's warrant. It therefore does not import, that there is any *intrinsic nullity* in the seizin, such as, that the infeftment was only given in the presence of one witness, or that the notary and witnesses do not sign the instrument ; in which cases, the nullity cannot be removed by any collateral production, or upon any presumption whatever. But the objection in question is altogether extrinsic. The seizin is good, if properly warranted to be taken in that form by antecedent titles, and the only question is, whether these must be produced in support of the seizin.

If the challenge had been made before the prescription had run, this might have been required ; but the objection comes too late after the right has stood unchallenged for 40 years. The defender cannot now be obliged to produce grounds and warrants in support of the investiture. He is as little bound to produce the antecedent titles to instruct the granter's power of giving the dispensation, as he is to produce these titles for instructing, that the granter was in the feudal right of the lands.—The want of power is not a more essential defect than the want right.

Replied for the pursuer ; The lapse of the years of prescription supplies the want of right to the property of the subject in the granter of that charter or disposition, which is founded on as the title of prescription. This was the sole purpose of the act 1617 ; and, on this account, the act supercedes the necessity of producing the more early titles for instructing, that, before the date of the charter, the granter and his authors had a sufficient right to the property of the subjects disposed. But the charter and seizin produced must be, in every respect, compleat, according to the feudal forms. The lapse of 40 years cannot supply any defect in the powers assumed by the granter, as to the manner of completing the conveyance.

In the present case, therefore, this circumstance, that the infeftment is not taken on any part of the lands disposed, is sufficient, in law, to render it null ; and no length of time can supply this essential defect.—The law will never presume, that the granter was possessed of such a privilege, when nothing is shown to instruct it.

But the terms of the disposition exclude every presumption, that this dispensation originally flowed from the crown. No previous dispensation

penfation is faid to have exifted. On the contrary, the words imply, that it is the fole act and deed of the granter of the difpofition; he directs infeftment to be taken at the manor-place of Bigton, ‘ and that ‘ in name of the haill above designed lands, and others above difpofed, ‘ which I, for me and my heirs, *quovifcunque titulo*, declare and ordain ‘ to be fufficient, as if infeftment had paffed upon every particular ‘ room of the lands,’ &c.

The court found, ‘ That the defender has produced fufficient to exclude, and therefore affoilzie him from this procefs of reduction.’ And to this interlocutor they adhered, upon advifing a reclaiming petition and answers.

Lord Ordinary, *Kennet.*
Clerk, *Tait.*

Agt. *Rae, B. M'Leod.*

Alt. *J. Campbell.*

No. LXXXV.

July 14. 1779.

M A R G A R E T B A I R D,

Againft

L A D Y D O N.

Warning to fervants.

MARGARET BAIRD was hired as houfe-keeper by Lady Don for half a year, from Whitfunday to Martimas 1777. At that term, fhe received her wages, and, without any previous warning, was difmiffed; on which fhe brought an action againft Lady Don, for payment of wages and board-wages for half a year, from the term of her difmiffion. In fupport of this claim,

Pleaded for the purfuer: When a fervant is hired to a term, and no precise warning given, *tacit relocation* takes place, agreeably to the principles of common law, and the general practice of the country. The purfuer having received no warning, underftood that fhe was to continue in the defender's fervice for the next half year after the term to which fhe was hired, and, on that account, did not look out for any other fervice. By this means, fhe has fuffered the lofs of which fhe now claims to be relieved by the defender, who was the caufe of it.

Answered: When the parties to a contract have themfelves fixed the period of its continuance, no intimation from the one to the other is neceffary to prevent its being diffolved at the time ftipulated. The parties are fufficiently afcertained of the endurance of their obligations to each other, by the exprefs terms of their agreement.

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If the servant is hired to a certain day, when the day comes, the prestations arising from the contract or agreement are no longer exigible. The servant is, *eo ipso* free from performing the service, and the master from paying the hire. To renew these obligations, for the like, or any other space of time, a new agreement is necessary, specifying the term of endurance. Though the servant should remain in the service of his master after the time stipulated, he comes under no obligation thereby, without express paction, to continue in it for any definite time. The master, in like manner, is not obliged to keep the servant longer than he chooses.

It was likewise averred to be a common practice for servants to leave their masters at the term without giving warning, and for masters to dismiss their servants in the same manner.

The court found ‘ the defender Lady Don, and Sir Alexander Don
‘ conjunctly and severally liable in payment to the pursuer of the
‘ sum of L. 5 Sterling of wages, and of L. 6 : 6 s. Sterling in
‘ name of board-wages, and decerned.’

Lord Ordinary, *Monboddo.*
Clerk, *Orme.*

Aff. *Corbet.*

Alt. *P. Murray.*

No. LXXXVI.

July 15. 1779.

G E O R G E and J O H N B U C H A N A N,

Against

J A M E S H U N T E R - B L A I R, and others.

Insurance.—Concealment by the insured.

IN Spring 1772, George and John Buchanan, merchants in Glasgow, sent out two ships, the Argyle and the Jeanie, to the Bay of Honduras, consigned to the care of M'Aulay, their agent at St George's Key in that bay.—M'Aulay was directed to load the ships with certain goods, and to send the Argyle to London, and the Jeanie to Bristol. But, on the 19th March, George Buchanan, with the knowledge of John Buchanan, wrote M'Aulay desiring him to send *the ship Jeanie to London.*

Messrs Buchanan received letters from M'Aulay, (September 1772), informing them of the arrival of these ships in the bay, and that they should *be sent agreeable to orders.* In November 1772, they got both cargo and freight of *the ship Jeanie* insured, to the extent of
L. 1050,

L. 1050, from the Bay of Honduras until she should arrive at *Bristol*. In the mean time M'Aulay had cleared out this ship from the Bay of Honduras for London. She sailed from the bay (4th September), and in a few days was totally wrecked on a rock about 18 leagues from St George's Key. The underwriters, when called on, refused to pay their shares of the loss, on this ground, that an alteration had been made on the voyage insured, by clearing out the vessel to *London* instead of *Bristol*.

An action ensued before the admiral-court, at the instance of Messrs Buchanan, against the insurers, in which the judge-admiral, after some procedure, pronounced this judgment: 'Having considered the whole circumstances of the case, and, in particular, that the pursuers did not disclose, and lay before the defenders, at the time of their underwriting the policy of insurance produced, and libelled on, their said directions to their said correspondent James M'Aulay, relative to the destination of the said ship for the port of London, and then set forth to them the embarrassing which might be occasioned by the contrary orders given by them relative to the destined port of delivery of the said ship in Britain, whereby the defenders might have had sufficient lights to determine themselves, whether or not, in these circumstances, they would have insured. Therefore, upon the whole, finds, that the said defenders are not liable in payment to the pursuers of the sums underwrote by them respectively upon the policy of insurance produced and libelled on; and, therefore, assolzie the said James Hunter defender, and the whole other defenders, from all the conclusions of the pursuer's libel.' A reduction of this judgment was brought by the pursuers, who

Pleaded: That they entered into this policy *bona fide*, under the impression of their having ordered both vessels to Bristol, and, from the same mistake, corresponded with their agent there concerning both.—The letters of correspondence were produced in evidence of this fact.—As the error in the policy was not wilful, the insurance ought to remain good.

The clearing out the vessel for London implied nothing more than an intention to deviate from the voyage.—But an intention to deviate does not vacate the policy.—When the vessel is lost before actual deviation, as in the present case, the insurers remain bound.—It is of no consequence at what time the intention to deviate is taken up, whether before or after the voyage commences, if there is no actual deviation.—This has been determined in the courts of England, and the insurers are held to be equally liable in the former case as in the latter; *Foster versus Wilmer*, Hilary-term, 19. G. II. Strange, p. 1249.—Several instances of a like nature are stated by *Bynker. quæst. jur. priv. lib. 4. c. 3. p. 545. Ibid. c. 5. p. 562. c. 10. p. 603.*

Answered for the defenders: The pursuers, *before insuring*, were acquainted with the alteration on the voyage. They had given order for it, and been informed by their agent, 'That the vessels were to be sent according to their orders.' Whether the subsequent insurance of the ship, for a voyage to Bristol, proceeded from improper motives

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or mistake, makes no difference. When a material circumstance is misrepresented by the insured, the policy is vacated in either case.

But it is enough for the present purpose, that, in point of fact, the ship was dispatched upon a voyage to London, and consequently not upon the voyage insured. Though the insurers had not been in the knowledge of the fact, the policy is thereby discharged. The insurance is undertaken on the footing of a particular adventure or voyage, with respect to which alone the insurer is presumed to have calculated a premium, or chosen to become bound. If the vessel sets out on any other voyage, no claim can be made against the insurer on the policy, as it does not apply to the voyage. For this reason, in practice, where a voyage insured is given up or altered, the insurance falls of course. The *premium* must be given back by the insurer, who, on his part, is not bound to make up any loss that happens upon the voyage performed.

The argument of the pursuers, upon the effect of a deviation, is misapplied. The present question does not occur in the case of deviation from a voyage on which the vessel had set out, but in a case where the destination of the vessel was altered from the first, and the insured voyage never begun. London was the only port to which the ship was destined; and she never went on a voyage for Bristol, the port to which she was insured.

This, therefore, is truly a question on the construction of the policy, whether a voyage to London was covered by the insurance of a voyage to Bristol, on no other account but that the course to both is the same for part of the way? Were it found to be so, the judgment would have very extensive consequences. It is obvious, that the course of voyages, to very different and distant parts of the world, is often the same for a considerable part of the way, and insurers would be left in total uncertainty what was the voyage actually undertaken.

The judgment of the court was, ' Approve of the judge-admiral's proceedings and decret, and affoilzie the defenders.'

Lord Ordinary, *Auchinleck*.
Clerk, *Tait*.

A&A. *Alex. Murray*.

Alt. *Ilay Campbell*.

No. LXXXVII.

July 27. 1779.

WALTER SLOAN-LAURIE,

Against

ALEXANDER SPALDING-GORDON.

Executor.

IN 1741, Walter Laurie granted a legacy, in favour of Walter Sloan, in the form of a bond, for L. 60, payable one year after his death. Laurie died soon after: and, in 1745, James Laurie, his nephew, and only next of kin, had a general intromission with his moveable effects, and obtained himself confirmed in a part of them.

Walter Laurie, some time before his death, had conveyed over to Robert Gordon a moveable bond for L. 500, which Gordon owed him, *reserving the annualrents during his own life*. The interest, therefore, remaining due to Laurie on the bond, when he died, came to be part of the moveable effects *in bonis* of the defunct.

In 1755, Sloan, who had got no payment of his legacy, confirmed executor-creditor to Walter Laurie in this subject, and brought an action against Alexander Spalding-Gordon, the representative of Robert, for payment of these interests.

The defender, in bar of this action, contended, that the whole of the defunct's moveable effects, and of consequence these interests, were vested in James Laurie by means of his partial confirmation,—and that he had claims against Laurie sufficient to compensate the interests.—In support of this objection,

Pleaded for the defender: The nearest of kin is the heir *in mobilibus*. His right to succeed to the moveable effects was known in the antient common law of Scotland, though the usurpation of the clergy had greatly encroached on it. The act 1540, c. 120. gave the first check to these usurpations. In this act, the nearest of kin is supposed to be, *ipso jure*, vested with a proper right of succession, separate from any authority given by the ecclesiastical court.

The statute sets forth the iniquity done by executors-dative, in withdrawing the effects of children dying under age ‘*fra the kin and freinds that suld have the samen by the law*’; and enacts, that, for the future, the nearest of kin ‘*suld have their gudes*.’—From this time the right of the nearest of kin to the defunct's moveables came to be acknowledged in courts of law, and held to be expressly independent of the office of executor, or any title derived from the ecclesiastical court; Stair, b. 3. t. 8. § 11.—A partial confirmation by the nearest

nearest of kin, and possession of any part of the subjects, as they implied that he had entered on the succession, were held to vest in him the right of the whole effects. Accordingly it was early found, and is now a fixed point, that these are sufficient upon his death to transmit the whole moveables to his heirs at law; Bells against Wilkie, February 12. 1662; Forfyth against Paton, February 17. 1663, Stair.

By act 1690, c. 26. the succession in moveables was freed from what remained of those restraints which the clergy had laid on it; all the modes by which the commissary court had attempted to oblige the nearest of kin to confirm, were entirely prohibited, and the act has been considered as allowing the succession in moveables to be taken up by the possession alone without confirmation; Br. antiq. p. 180. Bankt. b. 3. t. 8. § 118. 119. On this ground, the decisions proceeded, M'Whirter against Miller, November 14. 1744, Falc. Ogilvie against King's Advocate, February 13. 1760.—But, in the present case, there was both an intromission with the effects, and a partial confirmation, which has always been held a legal method of taking up the succession, and vesting the whole subjects in the nearest of kin.

The preference given to the creditors of the defunct doing diligence on the subject within year and day, over those of the nearest of kin, does not aid the pursuer's plea.—It is merely an exception from the common law, introduced by a special provision in the act 1695; and, therefore, where no such diligence is done within the year and day, and there has been a partial confirmation by the nearest of kin, the creditor of the defunct has no preference on the moveable subjects that belonged to him. If he can attach them at all, it is only on the footing of their being the property of the nearest of kin, who succeeds to the defunct in this part of the subject.

It has now become an established practice for the debtors of the defunct to pay his nearest of kin, and to take discharges from him without scruple, though in the knowledge that their debts have not been confirmed.—They have been considered as perfectly safe in doing so; and such discharges are held to be valid and effectual; Bankt. b. 3. t. 8. § 20. But, if it shall be found that nothing is vested but what is specially confirmed, no debtor will rely on such a discharge.—Confirmation of the debt will always be required before it is paid.—Thus the succession to moveables will be loaded with an additional expence.

Answered for the pursuer: At an early period, the clergy assumed a superintendence of the execution of all last wills, chiefly on pretence, that the execution of a trust was a matter of conscience, and all testaments implied a trust. The person appointed by a testament to administer, was obliged to apply to the ecclesiastical court, for leave to enter on the management, to make up an inventory of the subjects in that court, and find caution to administer properly.

In succession *ab intestato*, the clergy interfered on the same ground. The deceased having failed to name a trustee, this defect was supplied by the bishop of the diocese, in consequence of his general controul over trusts.

In

In distributing the effects, the defunct's creditors were first to be paid by the executor-dative. A portion of the effects was then set apart to answer the legal rights of relict and children; and the clergy considered the remainder of the succession as *bona caduca* in their own hands, to be applied as they thought fit.—The object of the act 1540 was merely to rectify this latter abuse.—It applied only to a particular case; but, as the power of the clergy soon after declined, the statute received a liberal interpretation.—The dead's part, no longer considered as a caduciary right in the hands of the church was transferred to the nearest of kin, who came to be entitled to the office of executor in all cases.

But, although the clergy were thus restrained from seizing on the dead's part, the nearest of kin, in order to establish his right in any particular subject, must still apply to the proper court, and obtain himself specially confirmed in that subject. A partial confirmation is only sufficient to vest the office of executor in the nearest of kin, and to make it transmit, on his death, to his executors. By such confirmation, he obtains and takes possession of the office; and, being a general trustee for all concerned, may intromit with the defunct's other subjects, in order to account more completely to the creditors.

The nearest of kin, though in possession of the office of executor, is not, on that account, effectually vested in the defunct's subjects. He has no *jus exigendi*. It is an established point, that the defunct's debtor may always refuse to pay, until the debt itself is confirmed. Even when the nearest of kin gets a license to pursue, he is only entitled to obtain a decree, and the debt must be confirmed before extract; so that he can never have execution against the effects themselves without a confirmation. None of the defunct's effects, therefore, vest, *pleno jure*, in his nearest of kin, until they are specially confirmed. Though he had even obtained possession of the effects, they might be attached, as *in bonis defuncti*, by the creditors of the deceased, and the creditors of the executor, in whom they never were vested, would have no title to challenge their diligence.

The decisions founded on do not apply.—They go no further than to show, that the office of executor, established in the person of the nearest of kin, transmits to his executors.—These heirs may be entitled to intromit, but, without a special confirmation, are not vested in the right to any subject.—There is no ground for supposing that the act 1690 meant to alter the law in this matter. It establishes only, that the commissary-court cannot oblige a person to confirm for their emolument, if he does not otherwise choose it.

The statute 1695, c. 41. is in favour of the pursuer's plea; for it proceeds on the hypothesis, that, at common law, creditors of the nearest of kin had no access to any subjects which their debtor did not choose specially to confirm. It directs by what methods the creditors shall be enabled to attach such effects for the future; but, when these methods are not used, as in this case, the subject remains *in bonis defuncti*, attachable by the diligence of the defunct's creditors.

Though the executor cannot oblige the debtor to pay, if the debt is not specially confirmed, yet payment made to a person vested in the

office of executor, is always sufficient to liberate the debtor. The determination of the court, therefore, in this case, cannot affect his safety.

The cause was determined on a hearing in presence and memorials.

The court found, ' That the annualrents in question are to be held ' as *in bonis* of Mr Walter Laurie, affectable by his debt.'

Lord Ordinary, *Hailes.*
Clerk, *Tait.*

A^c. *Croßbie.*

Alt. *A. Millar.*

No. LXXXVIII.

July 28. 1779.

The HERITORS and KIRK-SESSION of Coldinghame,

Against

The HERITORS and KIRK-SESSION of Dunfe.

Poor.

MARGARET SLEIGH had two children born in the parish of Dunfe, while residing there. In a few months after the birth of the youngest, she and her husband removed to the parish of Coldinghame, where they continued to reside for more than three years. After her husband's death, she applied to the heritors and kirk-session of Dunfe, for an aliment to her children; and, upon their refusing it, presented a petition to the sheriff, praying, that he would decern the parish to grant them a proper aliment. To this process the heritors and kirk-session of Coldinghame were afterwards made parties, and a question ensued, Whether the parish of residence, or that of the birth, was liable for the aliment? The sheriff decerned against the parish of Coldinghame. In a suspension of this judgment brought by the kirk-session and heritors,

Pleaded for the suspenders: In the case of an adult person claiming an aliment, the residence for three years, no doubt, fixes what parish is liable for it. The place where such a person resides is considered as benefited by his labour, and, therefore, the inhabitants of the parish are under a natural obligation to support him, when no longer able to work. But infant children, who are incapable of working, have no natural claim against the parish where they reside.—The parish of their birth is originally liable for their maintenance, and must continue to be so till they are grown up, and have acquired a proper residence in another; Kirk-session of Inveresk against Kirk-session of Tranent, 3d March 1757.

Answered for the parish of Dunfe: It is admitted, that, in the case of adult persons, three years residence fixes the aliment on the parish where they reside.—The infant children cannot be separated from their
parents

parents in this question. They are part of the same family, and the residence of the father is their residence.

The court found ' the parish of Coldinghame liable in the aliment
' of the two children within mentioned, born in the parish of
' Dunse; and, in so far found the letters orderly proceeded, and
' decerned; but, as to the *quantum* of the aliment, suspend the
' charge *in hoc statu*, and remit to the heritors and kirk-session of
' the said parish to modify said aliment *in prima instantia*; and to
' do therein as they shall see just.'

Lord Ordinary, *Alva*.
Clerk, *Tait*.

Act. *Wight, Blair*.

Alt. *Hay Campbell*.

No. LXXXIX.

July 29. 1779.

WILLIAM FINLAY,

Against

WILLIELMINA BIRKMIRE.

Deathbed.

WILLIAM BIRKMIRE was twice married.—By his first wife, he had four daughters, and executed several deeds in 1764, settling different parts of his succession on them and their children.—In particular, he disposed some buildings in the town of Paisley to Agnes, his youngest daughter.—This deed contained a power to alter, *even on deathbed*, and a clause dispensing with the delivery.

Soon after Birkmire's second marriage, he cancelled the disposition to Agnes; and, by a writing upon the deed, mentioned the cancellation to have been 30th September 1772. Of the same date he executed a new settlement, disposing the subject to himself in life, and the children of the second marriage in fee.

Birkmire died 14th November 1772, leaving an only child of the second marriage, Willielmina Birkmire.—After his death, William Finlay, son and representative of Birkmire's second daughter, brought an action as one of the heirs at law to his grandfather, against this child and her tutors, for setting aside the deed 1772, on the head of deathbed.

Pleaded in bar of this action: The heirs of law have no title to challenge the deed 1772. They were not hurt by it, as their right to the succession was excluded at that time by the previous deed 1764 in favour of Agnes.—It was *jus tertii* to them, whether Agnes should succeed, or any other disponent come in her place. Agnes is the only person who is affected by the new settlement; but she is barred from any challenge of it by the reserved faculty contained in the disposition to her.

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The cancellation of the deed 1764 does not remove the objection. It is an established point, that an implied revocation of a former deed will not entitle the heir at law to challenge the new deed *ex capite leſti*. An implied revocation has all the effects of an expreſs revocation.—They are ſubſtancially the ſame; and, on this principle, the court repelled the claim of the heir at law, in a caſe where the deed contained an expreſs clause revoking the former ſettlement; Crawford againſt Crawford, June 16. 1749.

But, at any rate, the cancellation of the deed in this caſe cannot be conſidered as opening the ſucceſſion to the heir at law.—It only took place at the time the new ſettlement was executed. They were both parts of the ſame tranſaction executed *unico contextu*; and the object of the granter evidently was, to alter one deſtination of heirs for another; but, in no event, to admit the heirs at law.

Answered for the purſuer: It is not ſufficient to bar the heir at law from inſiſting in a challenge *ex capite leſti*, that a previous deed in favour of a ſtranger had been executed. The deed muſt likewise remain during the life of the granter, neither cancelled nor taken out of the way by a ſubſiſting deed of revocation. If either of theſe take place, the heir at law returns to his right of ſucceſſion.

It may be admitted, that the ſame effect will not be given to a revocation merely implied from the terms of the death-bed deed.—In that caſe, the conſequence of ſetting aſide the death-bed-ſettlement will be, to take away the implied revocation, and open the ſucceſſion to the diſponee in the former deed, who, therefore, has the only right to bring the challenge.—But the effect of cancellation is to deſtroy the deed altogether, and put the diſponee in the ſame ſituation as if it had never exiſted.—The cancelled deed, therefore, can be no bar to the ſucceſſion of the heirs at law; and, conſequentially, it is not *jus tertii* in them to challenge the death-bed-deed.

The judgment was, ‘Sustain the purſuer’s title to inſiſt in the preſent proceſs of reduction of the deed challenged *ex capite leſti*.’

Lord Ordinary, Gardenſton.
Clerk, Tait.

Adv. J. Campbell.

Adv. Rolland.

No.

DECISIONS

OF THE

COURT OF SESSION.

No. XC.

November 17. 1779.

THOMAS LOMBE,

Against

THOMAS SCOTT.

Homologation.—Silence of a merchant to whom goods have been sent contrarily to the commission given by him, imports his homologation of the sender's proceedings.

ON the 10th of March 1776, Thomas Scott merchant in Kelfo commissioned from Thomas Lombe at Rotterdam twenty hogheads of lintseed for sowing, to be shipped on board the first vessel from Rotterdam to Leith, Berwick, or any of the interjacent ports; mentioning at the same time, that if the lintseed could not be landed before the 11th of April, he did not incline to make any purchase of that kind.

This commission reached Mr Lombe on the 23d of March. At that time there were no ships at Rotterdam destined to the ports specified by Mr Scott. Mr Lombe, however, shipped the lintseed on board a vessel for Newcastle, from whence it might be forwarded speedily, and at a small additional expence, to any of them.

On the 6th of April Mr Scott received Mr Lombe's letter, acquainting him with these particulars, but returned no answer till the 25th; when, upon being informed by Mr Lombe's correspondent at Newcastle, that the goods had arrived, he signified his disapprobation of Mr Lombe's proceedings, and declared his resolution to take no concern in the disposal of the articles sent.

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Mr

Mr Lombe pursued Mr Scott for the price of the lintseed, with commission, &c.

Pleaded for the defender : In the contract of mandate, any deviation from the precise terms of the commission must acquit the mandant of his obligation ; l. 5. dig. *Mandati*. In this instance a deviation of the most important kind occurred ; by which the goods were sent to a port where the defender had neither correspondents nor customers, and where, of course, the object of the commission could not in any proper manner be attained.

Had the pursuer complied with the mandant's injunctions, his claim might have been supported, although, by some misfortune the goods had not arrived within the limited time ; but as the loss here could not have existed but from his transgressing the limits prescribed to him, he alone ought to suffer by it.

Answered : The decision of this case must depend, not on the nature of the contract of mandate, as known in the Roman law, but on the general practice and understanding of merchants in transactions of this sort.

When a merchant, studying the interests of his correspondent, transmits goods to him without orders, or contrarily to the precise tenor of his commission, the risk attending this falls upon the sender. If, however, he gives immediate information of his proceedings, it is the duty of the correspondent immediately to notify his dissatisfaction, should the adventure be disagreeable to him. His silence on such an occasion is construed into an approbation of the measures adopted by the sender, which no after contingency will entitle him to retract. A contrary idea would be attended with fatal consequences to trade, by relaxing that punctuality of correspondence which is so necessary among merchants.

‘ The Lords repelled the defences.’

Lord Ordinary, *Gardenston*.

A. Hay.

Alt. Swinton, Nairne.

C.

No. XCI.

November 18. 1779.

J O H N A N D E R S O N,

Against

T H O M A S M O R T O N and G E O R G E A L E X A N D E R.

Community.—Office-bearers, how far liable for its debts.

THE weavers of Portsburgh, which is the burgh of the barony of Dalry, were erected into a society, by a seal of cause from the Lord

Lord of the barony, and are governed by a deacon and boxmaster, who are chosen annually.

Anderfon acquired right to a bond granted by the office-bearers of this community; and, in an action for payment, demanded a *personal* decret against Morton and Alexander, their successors in office;—who *objected*, That societies not united into a body-politic by the Sovereign, not being proper incorporations in the eye of law, their managers could not *ratione officii* be liable, personally, for monies borrowed by their predecessors in office; and that the creditor in these monies could only attach the funds of the society in their hands as the servants of the community; Kames, *Elucidations*, art. 54.

The Court admitted the distinction between lawful societies and incorporations properly so called; and found, ‘ That no action lay
‘ against the present office-bearers of this company or incorporation,
‘ for subjecting them personally, or their own proper effects,
‘ to the payment of the bond pursued on, but only for the
‘ special purpose of affecting the funds of the company for the
‘ same.’

Lord Reporter, *Gardenston*.

Aff. *Geo. Ogilvie*.

Alt. *Tytler*.

Clerk, *Campbell*.

L.

No. XCII.

November 30. 1779.

HUMPHRY-BLAND GARDINER,

Against

GEORGE SPALDING.

Arrestment,—not a habile mode of affecting the reversion of an estate sold judicially.

MR GARDINER was a personal creditor of Spalding of Ashintilly, whose estate was sold by judicial sale; and it being, after payment of the heritable debts, sufficient to yield a reversion, Mr Gardiner used arrestment in the hands of the purchaser. To this arrestment it was objected, That the only competent mode of affecting the reversion of the price was by adjudication; and

The Lords found, ‘ That an arrestment is not a habile way of attaching or affecting the reversion of a bankrupt-estate, sold
‘ under

‘ under the authority of this Court, in the hands of the purchasers thereof.’

Lord Ordinary, *Westhall.*

A& G. *Ferguson.*

Alt. *Nairne.*

S.

No. XCIII.

December 9. 1779.

Sir JOHN and Sir ROBERT ANSTRUTHERS,
Baronets,

Against

The Countess of ROTHES.

Prescription. How the negative prescription applies to claims of relief.

IN 1716, John Earl of Rothes, Sir John and Sir Robert Anstruthers, granted bond, conjunctly and severally, to Mr Philp, for the sum of 5000 merks, payable at Lammas then next, with interest from the term of payment.

The first two years annualrents were paid by the Earl of Rothes, and those of the subsequent years, till 1749, by Sir John and Sir Robert Anstruthers.

In 1755, Mr Philp brought an action against the then Earl of Rothes, Sir John and Sir Robert Anstruthers, as representing the original debtors, for the principal sum, and for the annualrents incurred since 1749. Sir John and Sir Robert Anstruthers paid the whole; and in 1776 brought an action against the Countess of Rothes, the representative of Earl John, the original obligant, for relief of the sums paid by them and their predecessors.

In this action it was found, ‘ That in respect all the three original obligants were bound conjunctly and severally, they were cautioners for each other to the extent of their respective shares.’ And on this footing a demand was made by the pursuers for a third part of the annualrents paid by their predecessors from 1718 to 1749.

To this demand, so far as regarded the annualrents paid forty years prior to the commencement of the action in 1776, the defender objected the negative prescription; and

Pleaded: The claim of the original creditor for the annualrents now in dispute was completely extinguished by the annual payments from Sir John and Sir Robert Anstruthers, and in its place were substituted the claims of relief competent to these gentlemen, for the sums advanced by them beyond their proportion of the debt.—Here then the original contract underwent a total innovation. The creditors

tors were no longer the same. As the annualrents of the different years, when paid by the co-obligants in their character of cautioners, became capital sums, each bearing interest, Erskine, b. 3. tit. 3. § 78. the debts themselves were essentially different. Even the actions competent to the co-obligants for effectuating their relief were not coeval with the original obligation, but arose in an annual progression corresponding to the several payments. These annualrents are therefore to be viewed as totally distinct and independent debts, each affording a separate ground of action, and suffering a separate extinction by prescription; and as no document whatever has been taken on any of these debts for forty years, this legal exception must be fatal to the present claim.

In the case of personal bonds bearing annualrent, it has been laid down, Erskine, b. 3. tit. 7. § 13. that the annualrents being accessory to the principal sum, the preservation of the latter from prescription will keep alive a claim for the former for any length of time; and it may from thence be said, that as in this case the principal sum is still exigible, the interest must be in the same situation.—But although accessions of this kind, while they remain in their original state, participate the nature of those rights, to which they are annexed, they are not however so closely connected as to be inseparable from them. Thus had these annual rents, as they fell due, been assigned to a third party, or to one of the pursuers, it will not be disputed, that they would have become distinct debts, subject to prescription, although the principal obligation remained entire, and capable of being preserved, though the negligence of the creditor in the principal obligation should have vacated his right. Or suppose, that, after the cautioners having paid one year's annualrent, the principal obligation had been destroyed or departed from, it surely could not have been maintained, that the cautioners claim of relief for the sum paid, being accessory to that of being relieved from the whole obligation, was at an end when that event took place.

Answered: It is a mistake to imagine that the original obligation of the principal debtor was dissolved upon payment by the cautioner. The law supposes the cautioner, whether he takes a discharge or an assignation for the sums paid by him, to have advanced the money merely to relieve himself. The obligation on the principal debtor is still entire and unimpaired. Nothing therefore hinders the creditor, so long as the principal obligation is not cut off by prescription, to assign both principal and annualrent to the cautioner: nor can the debtor object to a transaction which equity requires, and in which, being no party, he has no title to interfere. With regard to him, the creditor still stands in the full right of the debt; and the judgment of the Court must in this case be the same as if the creditor, upon payment of the principal sum, had expressly assigned to the pursuers the annualrents now in question, or had taken up his different receipts for these, and given one discharge for the whole.

This matter may be viewed in another light.—Here no bond of relief was given to the co-obligants. Equity however supplies that

defect, rendering their claim as effectual as if that obligation had expressly intervened. Their claim is therefore co-extensive with the debt which gives rise to it, including not only the principal sum, but also the bygone annualrents as accessories; and so long as the principal debt is kept alive, the accessories must in like manner be exigible. The cautioners indeed might have sued for relief of each year's annualrent as it was paid; but they were under no necessity of doing so, any more than the creditor was obliged to accept partial payments. Let it be supposed, that a cautioner, having a bond of relief, had made payment of the annualrents for fifty years, as they fell due, and had afterwards paid the principal sum, his claim against the principal debtor could not be limited to those annualrents which had been paid within the forty years. It is in truth a claim of damages, arising from an individual transaction, and cannot admit of a partial prescription.

‘ The Lords repelled the defence.’

Lord Ordinary, *Covington.*
General Murray, *Rae.*

Adv. Hay Campbell, *John Anstruther junior.*

Adv. Solicitor.

C.

No. XCIV.

E O D E M D I E.

L U D O V I C K G R A N T,

Against

M A N S F I E L D, R A M S A Y, and Company.

Debtor and Creditor.—Beneficium cedendarum actionum. *Whether a creditor recovering his payment out of the estate of the principal debtor, is bound to assign to the postponed creditors on that estate his right of action against a cautioner.*

Inhibition does not affect deeds without which the granter could not have acquired the subject of competition.

MR CHARLES GASCOIGNE entered into a minute of sale with Sir James Campbell, concerning the lands of Dalderse, belonging to the latter. The price was L. 27,000; of which L. 15,000 was to be heritably secured on the lands themselves; L. 3000 was to be paid immediately; and for the remaining L. 9000 Mr Gascoigne, the purchaser, and his two cautioners, Mr Francis and Mr Samuel Garbet, were to grant a personal bond, which was to be guaranteed by
an

an assignment of L. 12,000 capital stock of the Carron Company, belonging to Mr Samuel Garbet.

After the execution of this minute of sale, which contained neither procuratory of resignation nor precept of seizure, Mr Gascoigne, the purchaser, and his two cautioners, became insolvent; and Sir James Campbell, in addition to the collateral securities formerly stipulated, insisted, that the whole price should become a real burden on the lands. His demand was complied with in the following manner: Sir James granted a disposition, declaring the price to be a real burden on the lands; Mr Gascoigne granted heritable bonds for the price in the different proportions already mentioned; and the investments on these several rights were taken and recorded on the same day.

The heritable bonds for L. 9000 and L. 3000 came by assignment into the persons of Mansfield, Ramsay, and Company, bankers in Edinburgh.

The estate of Dalderse was brought to a judicial sale by Mr Gascoigne's creditors. The interests produced were; 1st, The heritable bond to Sir James Campbell for L. 15,000; 2^{dly}, The heritable bonds for L. 9000 and L. 3000, in the persons of Mansfield, Ramsay, and Company; and, 3^{dly}, Several adjudications led by Mr Gascoigne's personal creditors; one of whom, Mr Ludovick Grant, had executed an inhibition after the minute of sale, but before its completion in the manner already narrated.

In the ranking two questions occurred. The first was, Whether Mansfield, Ramsay, and Company, on drawing the sum of L. 9000 out of the price of Dalderse, the estate of the principal debtor, were obliged to assign to the postponed creditors on that estate the collateral security of the L. 12,000 Carron Stock granted by Mr Samuel Garbet the cautioner, to Sir James Campbell.

Pleaded for the postponed creditors: A creditor preferably secured on two subjects may take his payment wholly out of one; but as he cannot by so doing postpone in an arbitrary manner any secondary creditor, he must assign to him, whose security is thereby diminished, that by ranking in the cedent's place, the secondary creditor may communicate the loss resulting from the preferable security, to all those standing in the same degree of preference. Nor can any distinction arise from the nature of the security which is to be assigned. Whether it is a cautionary obligation, or an incumbrance on a separate estate, the catholic creditor might have operated his payment out of it; and equity requires that his debt should be paid by equal proportions out of the whole funds.

Answered: Assignments of this nature, having their foundation solely in equity, cannot be demanded where equity requires the catholic creditor to draw his payment, if possible, from particular funds. The obligation of Mr Garbet, to whose prejudice the assignment is here demanded, was merely subsidiary, taking place upon the failure of the principal debtor; and whenever the principal debtor pays, his cautionary obligation is at an end. Hence the creditor taking his payment out of the funds of the principal debtor, does nothing arbitrary or unjust. On the contrary, to act otherwise would be an extension of the cautionar

cautionary obligation, palpably wrong and oppressive, to which no court of equity will give a sanction; Principles of Equity, p. 18.

The next question, respected the effect of the inhibition used by Mr Grant after the minute of sale, but before the sale was completed. It was admitted, that the heritable security for L. 15,000, being part of the original bargain, was unchallengeable; and it seemed likewise to be admitted, that the security for L. 3000, which by the original agreement was to be paid immediately, was in the same predicament. But with regard to that for L. 9000, it was

Pleaded: By the minute of sale, Sir James Campbell became bound to convey the lands upon receiving L. 3000, an heritable bond for L. 15,000, and a personal bond for the remainder; and although the minute contained no procuratory nor precept by which the purchaser could be instated in the feudal right, yet Sir James Campbell could have been compelled by action at law, or by adjudication, to implement the precise terms of his agreement. The after transaction, therefore, by which the whole price is made a burden on the lands, as also the heritable bond for L. 9000, being a deed entirely voluntary on the part of the debtor, must be affected by the inhibition.

Answered: Even after the minute of sale Sir James Campbell continued in the property of the lands. The insolvency of the purchaser and his cautioners entitled him to reprobate their personal security; nor could he have been obliged, either by the purchaser or his creditors, to divest himself before receipt of the price. The condition, therefore, under which this sale was carried into execution, created a real burden on the estate, from which the creditors of the purchaser affecting it for their payment cannot shake themselves loose.

As to the first point, 'The Lords, in respect Mr Garbet was only
' a cautioner, found, That Mansfield, Ramsay, and Company
' were not obliged to assign the security granted by him upon
' the stock of the Carron Company in farther security of L. 9000
' contained in the bond granted by Charles Gascoigne.'

As to the second, the Lords found, 'That the inhibition at the
' instance of Ludovick Grant did not affect either of the bonds
' in question, so as to make them reducible at his instance.'

Lord Ordinary, *Elliot*.

Adv. *Hay Campbell*.

Adv. *M'Laurin*.

C.

No.

No. XCV.

December 17. 1779.

WILLIAM FULLERTON.

Against

JAMES RICHMOND.

Glebe.—A minister in a royal burgh, having a landward territory annexed to it, has right to a glebe, there being church-lands within the parish.

THE parish of Irvine is composed of the royal burgh of that name and a landward district. Its ministers had never been possessed of a manse; and their glebe amounted to little more than an acre.

In 1775, the presbytery of Irvine intending to enlarge the glebe of this parish to the legal extent, it was contended for Mr Fullerton, the proprietor of the church-lands nearest the church, that the ministers of royal burghs were not by law entitled to glebes, although some from private gift possessed lands distinguished by that appellation. From this he inferred, that Mr Richmond, the minister of this parish, was not entitled to the proposed enlargement. In support of the general proposition above mentioned, Mr Fullerton

Pleaded: The right of ministers in Scotland to a manse and glebe, which is derived from special enactments, 1563, c. 72.; 1572, c. 48.; 1592, c. 118.; extends not to those in royal burghs, who are understood to have advantages of other kinds more than sufficient to compensate that want. Hence, by act 1644, authorising the designation of manses and glebes out of temporal lands, it is expressly declared, 'that borrowstown-kirks are always excepted.' And when it was judged proper to accommodate all ministers with manses, a particular statute was necessary in favour of ministers in royal burghs; 1649, c. 45.

The two last acts being rescinded in 1661, and rights of ministers thereby restricted to their former extent, it is taken for granted by act 1663, c. 21. that ministers in royal burghs, unless from private endowments, have no right to glebes, it being there ordained, 'That all ministers should have a certain proportion of ground allotted to them for grafs, *except such in royal burghs as have not right to glebes.*'

This argument is farther supported by the interpretation given to other parts of the act 1663. By one of the rescinded acts it has been seen, that ministers in royal burghs were to be provided with manses; and by this act, competent manses are directed to be built in every parish. But as no express provision occurs in the last statute in favour of ministers in royal burghs, it has been found, that these, even

where part of the parish was landward, could not demand a manse ; June 19. 1751, Thomson *contra* the Heritors of Dunfermline ; Facult. Coll. February 28. 1769. It may therefore be reasonably concluded, that their right to glebes is in the same situation.

Answered: By the statutes passed after the Reformation, authorising the designation of glebes out of church-lands, the legislature did not create a new right in favour of ministers, but only preserved, or revoked so much of the antient patrimony of the church as was necessary for accommodating those serving the cure with ground sufficient for maintaining their families in a comfortable manner. Hence, by the three first statutes, all ministers, without distinction, may insist for glebes, where there are church-lands within the parish ; nor is it obvious why ministers in royal burghs, whose charges are generally most laborious and expensive, should in this matter be put in a worse situation than those in parishes entirely landward. When indeed, by statute 1644, lands which had never belonged to the church were, contrary to the general idea of the legislature, made subject to this burden, the inhabitants of royal burghs were exempted from an allotment which the value of property so situated would have rendered exceedingly grievous. But this distinction, originating from that statute, is now completely done away by its repeal.

The exception in the statute 1663 clearly shews, that ministers in royal burghs are not in general excluded from this advantage. For if, by ‘ ministers having right to glebes,’ had been meant those who had obtained them by private endowments, no reason can be assigned for giving to such an additional preference over their brethren ; and agreeably to this the court decided ; Stair, December 4. 1664, Minister of Dyfart *contra* the Heritors ; Fount. March 26. 1685, Minister of Kirkaldy *contra* the Heritors. The point, whether a minister of a royal burgh is entitled to a manse, has never yet received a determination on general principles, the decisions quoted having been founded on specialties. There is however an obvious distinction between manses and glebes in this respect ; the former, by the acts before the Usurpation, being only due to ministers where there was a parson or vicar’s manse within the parish, whereas the latter could be demanded out of any church-lands so situated.

‘ The Lords repelled the defence.’

Lord Ordinary, *Gardenston*. For Mr Fullarton, *Ilay Campbell*. For Mr Richmond, *Hay*. Clerk, *Tait*.

Nota. It was observed on the bench, that the report, Faculty Coll. February 28. 1769, was erroneous, the decision there having proceeded on the particular circumstances of the case.

C.

No.

No. XCVI.

January 12. 1780.

WILLIAM MACONCHIE,

Against

JAMES, MARY, and GRIZEL GREENLEES.

Provisions to heirs and children.—An assignment by an heir of a marriage, of her interest, how far effectual, she having died before her father.

BY marriage-contract between James Beveridge and Janet Smibert, in 1719, the former obliged himself to provide 2000 merks, two tenements in Edinburgh belonging to him, and the conquest during the marriage, 'to himself and the said Janet Smibert in conjunct fee and liferent, and to the heirs procreate and to be procreated between them, in fee.'

The issue of this marriage, which dissolved in 1730 by the death of Janet Smibert, were two daughters, Jane and Margaret.

Jane, upon her marriage, discharged her father of the provisions due to her. Margaret intermarried with William Maconochie, and assigned to her husband all right accruing to her from the marriage-contract between her parents.

Mrs Maconochie predeceased her father, who died in 1778; and her husband, by virtue of the conveyance already mentioned, pursued her father's representatives, James, Mary, and Grizel Greenlees, his grandchildren by a second marriage, for the provisions alledged to belong to her.

The merits of this question depended on the right of Mrs Maconochie, the assigner. If, upon the dissolution of her father's first marriage in 1730, she became a proper creditor to him in the provisions stipulated by the marriage-contract, her right was habilely transmitted to the pursuer. If, again, her interest was merely an expectancy of succession contingent on her outliving her father, the conveyance in favour of her husband was vacated by her predecease.

Pleaded for the pursuer: Notwithstanding the provisions in the marriage-contract, Mr Beveridge remained fiar of the special subjects therein stipulated, as also of the effects falling under the clause of conquest, which likewise became special and fixed by the dissolution of the marriage; and had he fulfilled his obligation, by taking the right to these subjects in favour of the heirs of the marriage, it behoved Mrs Maconochie to have compleated her right to them by service as heir of provision to her father, which she could not do while he was alive. But Mr Beveridge fulfilled no part of his obligation; and to this state of matters the judgment of the Court must be applied.

Under

Under the marriage-contract an action was competent to Mrs Macnochie against her father, for compelling implement of his obligation; Ersk. b. 3. tit. 8. § 38.; which upon his death might have been converted into an action for payment, requiring no service to make it effectual, 3d February 1732, Campbell *contra* Duncan; Faculty Coll. vol. 2. No. 202. 255. Her right could have been discharged by her during her father's lifetime; 13th February 1770, David Sinclair-Threipland *contra* Sinclair; Dr Stewart Threipland *contra* Mrs Henrietta Sinclair, in 1779. These powers could not be exercised by a party having only a *spes successionis*, and show that a proper *jus crediti* was vested in Mrs Maconochie at the dissolution of her parent's marriage. The term of payment alone was suspended till her father's decease.

Answered: The heirs of a marriage-contract are in some respects distinguished from others. Their father cannot, by any gratuitous deed, defeat their right. An action lies at their instance, for compelling him, during his life, to take the rights of the subjects referred to in the marriage-contract conformably to the terms of the provision; and this action, in the event of their survivance, may be converted into an action for payment, it being settled by the decisions quoted for the pursuer, that no service is requisite in such a case for enabling them to discharge their father's general representatives. Still however their right is no more in any case than a *spes successionis*, depending on the condition of their father's predecease. Hence it is, that the provisions in a marriage-contract, upon the failure of immediate issue, devolve to their descendants, *jure representationis*, and these failing, are extinguished altogether. For if, upon the dissolution of the marriage, a right vested in the immediate issue, it would be taken up by their descendants in the character of heirs to them; if they died without issue, it would descend to their other heirs; and in every instance would be attachable by their creditors. In the cases quoted, the discharges granted by the heirs of the marriage had been validated by their father's predecease, whereby their right had become complete and exigible.

The Lord Ordinary found, ' That the pursuer had no title to insist ' in this action.' And to this judgment the Lords adhered, upon advising a reclaiming petition for William Maconochie, with answers for James, &c. Greenlees.

Lord Ordinary, *Elliot*.
Clerk, *Orme*.

A&S. Solicitor-General Murray, *Ilay Campbell*.

Alt. Rae.

C.

No.

No. XCVII.

January 13. 1780.

JAMES HILL,

Against

THOMAS HOPKIRK and JOHN MACALL.

Royal burgh.—Powers of the town-council to inflict fines on burgeses refusing to accept of offices within the burgh.

BY the set of the city of Glasgow, as recorded in the books of the Convention of the Royal burghs in 1711, the town-council was composed of the provost, three bailies, and twenty-five common-counsellors, who were chosen annually. In this number were included the dean of guild, deacon-convener, treasurer, and master of the works, who were, *ex officio* constituent members of the council.

By regulations enacted in 1748 by the town-council, and likewise recorded in the books of the Convention, only four counsellors are to be changed every year, according to their seniority; but the dean of guild and deacon-convener must continue for one year after the expiry of their respective offices, and are afterwards to be removed in rotation with the other members of council.

By these regulations it was farther provided, That every person elected or continued a counsellor should be obliged to accept or continue under a penalty of L. 20, to be paid to the collector for the poor of the Merchants' House. After this, he could not be again required to undertake that office.—In the same manner, every person elected dean of guild was obliged to accept, under a penalty of L. 40.

Soon after these regulations were made, Mr Hopkirk, and Mr Macall had been elected counsellors, and paid their fines for non-acceptance. In 1778, they were, one after another elected deans of guild, and refusing to accept, were fined each in L. 40.

Of these fines they complained by bill of suspension, their contradictor being Mr Hill, the collector for the Merchants' House. The question chiefly agitated, was the legality of the regulations 1748; which introduced a considerable change into the set, and imposed fines on persons declining offices in the burgh.

Pleaded for the suspenders: It is not in the power of the town-council, though supported by the Convention, to new-model the constitution of the burgh; Faculty Collect. August 7. 1778, John Dalrymple and others, against James Stodart and others; much less by fines and penalties to enforce a deviation from the constitution. This last, which presupposes some crime, attended with a forfeiture of the delinquent's effects, is the prerogative of parliament. In any other

hands, it would be productive of dispute and arbitrary measures. In those of the rules of burghs, directed by motives of party and spleen, it would be peculiarly hurtful. It is quite distinct from the right which every corporation has to make by-laws in the matters intrusted to them. Nor can any reason be adduced in support of it from the practice observed in some of the cities in England, unless it could be shown, that the government of boroughs in England stands precisely on the same footing as in Scotland.

Answered: That the original sets of burghs, which in general have no other foundation than the consent, either expressed or implied, of the community may be altered by immemorial usage, or by regulations of the town-council, approved and adopted by the burghesses, is evinced by precedents in almost every burgh in Scotland. The recording in the books of Convention of the regulations now in dispute, which have been acquiesced in by all the other burghesses, as well as the suspenders themselves, was nowise requisite to their validity, but merely for certifying their authenticity at a future period.

But the question now at issue is not concerning an alteration in the set, but whether the town-council may, by an adequate fine, compel the performance of offices in the burgh. This seems not to admit of dispute. The power inherent in every corporation to make bylaws for the support of their own body, for regulating police, and the management of their own affairs, must be quite nugatory and unavailing, if this sanction were wanting to insure obedience from its members.

As the office of magistrate is essential to the existence of a royal burgh, persons refusing to submit in their turn to this burden, ought regularly to be deprived of their citizenship altogether. Consequently it is by a mild commutation of punishment, that a small fine is substituted in its place. Hence in the city of London the practice of fining those who refuse the office of mayor, sheriff, or alderman, is in daily observance. And the same rule is followed in Scotland, in every incorporated society, where the offices are not attended with power or profit sufficient to excite a competition.

It was separately contended for the suspenders, that having been already fined for refusing the office of counsellor, they could not, consistently with the regulations themselves, be again fined for declining an office necessarily including that of counsellor.

The Court seemed to be of opinion, That there existed in every society a power, by discretionary fines to compel performance of the public offices; but that in this case the town-council were barred by their own regulations from exacting the fines in question.

The Lords found, ' In respect of the special circumstances of this
' case, particularly that the suspenders formerly fined off when
' elected into the office of counsellors, and paid that fine of
' L. 20 Sterling, each, that they could not be of new fined for
' refusing thereafter to accept of or act in the office of dean of
' guild,

‘ guild; who *ex officio* must act likewise as a member of the town-council; and therefore suspended the letters *simpliciter*.’

Lord Ordinary, *Gardenston*,
Clerk, *Campbell*,

Adv. *Hay Campbell*.

Adv. *Moribland*,

C.

No. XCVIII.

January 14. 1780.

JAMES ERSKINE,

Against

GEORGE MANDERSON.

Debtor and creditor. Beneficium cedendarum actionum. A co-debtor entitled to receive assignation of diligence from the creditor for speedily operating relief.

MANDERSON and Hay were joint acceptors of a bill payable to Erskine, who sued both of them for payment; and as Hay pleaded no defence, immediately obtained decret against him.

Manderon however being still sued for the whole debt, made offer of payment, on condition of receiving an assignation to the decret against Hay, the *correus debendi*; which being refused, he, in a process of suspension brought on that ground,

Pleaded: ‘ A creditor cannot arbitrarily discharge his diligence done against one *correus debendi* to the hurt of the rest, who have a right to claim assignation;’ Dalrymple’s Decisions, No. 167. When a debt is discharged by a *correus*, it is certainly just that the creditor thus satisfied should communicate to him a right which he himself can no longer exercise.

In the present case, the assignation may be of important use; as without the circuit of a process of constitution it will entitle to immediate execution against Hay; by which means alone, perhaps, such danger as that arising from his suddenly converting his effects into cash, and leaving the kingdom, could be prevented. The creditor therefore should not be permitted to withhold that conveyance, notwithstanding the opposite tendency of a decision reported by Lord Stair in 1666, and of a later one by Lord Fountainhall, which indeed is less connected with the present question, or of the opinion of Mr Erskine, founded on the authority of those judgments. It is however to be remarked, that Lord Fountainhall has subjoined to the last mentioned decision this acknowledgment, ‘ that with respect to the *beneficium cedendarum actionum*, our practice is not yet arrived at a full consistency’

Answered:

Answered for the creditor : By the Roman law, the *beneficium cedendarum actionum* was indeed allowed to cautioners ; but the reason of it was, that there were no other means by which they could operate their relief. In ours, such a claim is rejected, because they may obtain relief without that extraordinary remedy ; though perhaps it might enable them to execute diligence more speedily. Nor is it necessary to add, that the case of no co-obligant is so favourable as that of a cautioner ; which the suspender is, being joint acceptor of a bill for behoof of another. That the above is the doctrine of our law, is evident from Erskine, p. 474 ; Stair, July 10. 1666. Hume *contra* Kers ; and from Fountainhall, December 12. 1695, Wood *contra* Gordon.

The Lords found, ‘ That the creditor was bound to grant the assignation demanded by the suspender.’

Lord Ordinary, *Alva.*
Clerk, *Campbell.*

Adv. R. *Sinclair.*

Adv. *Buchan-Hepburn.*

No. XCIX.

January 14. 1780.

L I N D I L L O N,

Against

J O H N C A M P B E L L.

Tailzie.—Of burgage-tenements.

Recompence,—Whether due to a party for meliorations on an estate subject to a strict entail ?

THE late Mr Campbell of Blythwood set in tack to Lin Dillon a tenement in the town of Glasgow, consisting of two old houses and a small garden, and became bound to pay, at the end of the lease, the value of the buildings erected by the tenant.

Upon Mr Campbell's death, the estate of Blythwood, comprehending this tenement, was taken up by his son, as heir under a strict entail ; who, upon the expiry of the lease, was sued in an action for the value of the buildings erected in consequence of the stipulation above recited.

In this action the Lord Ordinary assailed the defender, ‘ in respect ‘ it was not alledged that he represented the late Blythwood in any ‘ other manner than as heir of entail in the estate of Blythwood ; ‘ which entail contains the usual *prohibitive, irritant, and resolute* ‘ clauses, *de non alienando vel contrahendo debita.*’

Against

Against this judgment the pursuer *reclaimed*, and

Pleaded: The statute 1685, authorising entails, was calculated to perpetuate great estates, and cannot be extended to burgage-tenements, like the present.

This plea was without difficulty over-ruled by the Court.

Pleaded, 2do, By the improvements in question, the defender enjoys an addition to his fortune and income. To that extent, therefore, independently of any passive title, he must be liable, upon the principle, '*Quod nemo debet cum aliena jactura fieri locupletior.*' Nor can the statute 1685, by which heirs of entail are prevented from selling or burdening the estate with debt, be understood to bar claims of this equitable nature. The present case is analagous to that where a person, by the embankment of a river, has preserved an estate from total annihilation, Kames' *Elucidations*, art. 43.; or where one has rebuilt a house which had been burnt, and who has been found to have even a real security on the subject; *Fount. February 22. 1706, Temple contra Cairns.*

The statute 10th Geo. III. c. 51. was necessary for enabling heirs of entail to grant such leases as, on account of their extraordinary endurance, were deemed equivalent to an alienation of the land itself; and for subjecting succeeding heirs of entail to the expence laid out by their predecessors in meliorations, even where these had ceased to exist. From that enactment, therefore, it cannot be concluded, that this claim, which does not fall under the statute, must be altogether ineffectual against the heir of entail.

Answered: A party contracting with the proprietor of an entailed estate must be presumed to have framed his stipulations with a view to the precarious tenure of his debtor. Equity, therefore, cannot interpose to give effect to them after the right of the debtor is at an end. As little can equity interpose to oblige the defender to purchase a subject belonging to another, which is perishable in its nature, and which he can enjoy only for the period of his own life.

There is no instance hitherto known, where a debt binding on a person in the character of heir of entail, may not be the ground of attaching by legal diligence the estate itself. A decision favourable to the pursuer, therefore, must in the end annihilate all settlements of entail, by authorising heirs in possession to enter into engagements of this sort. It must entirely supersede the statute of the 10th of his present Majesty, providing, under proper limitations, for the improvement of entailed estates. As the principle on which it would rest, has no relation to the value of the estate, or the duration of the defender's right, it is even repugnant to that statute which enacts, that the improvements shall not exceed four years' rent, and shall only be chargeable on each heir by certain rules there established.

The Lords, at first, moved by the equitable nature of the pursuer's demand, 'found the defender liable in the prestations of the

‘ lease ;’ but, upon advising a reclaiming petition, with answers, they returned to the judgment of the Lord Ordinary.

Lord Ordinary, *Braxfield.*
Clerk, *Tait.*

A&A. *Cullen.*

Alt. *Swinton, Ilay Campbell.*

C.

No. C.

January 14. 1780.

J O S E P H S Y M I N G T O N,

Against

A N D R E W C R A N S T O N.

Warrandice.—Thirlage.—Whether a proprietor is bound by a general clause of warrandice to relieve his tenant of a thirlage?

C R A N S T O N let to Symington a dwelling-house, with a malt-barn, kiln, &c. situated within the precincts of the Abbey of Holyrood-house, warranting his possession against ‘ any stop or impediment ‘ whatsoever ;’ but no mention of any thirlage was made in the lease. After he had possessed some years, however, a claim for multures was made on the tenant by the proprietor of the mills of the barony of Broughton, the premisses making part of the barony, and being thirled to its mill.

Symington then sued Cranston in an action of relief, founded on the clause of warrandice in the tack, and on an allegation of his total ignorance of the existence of the thirlage, while that fact must have been well known to his landlord.

The Court, however, found, That the landlord was not bound to relieve the tenant of the thirlage ; and therefore

‘ Affoizied the defender.’

A&A. *G. Ferguson.*

Alt. *Wight.*

Clerk, *Campbell.*

S.

No.

No. CL.

January 19. 1780.

L O R D E L I B A N K,

Against

M A R G A R E T H A Y.

Removing. Act of federunt 1756.—Whether an arrear of a year's rent due to the landlord's executor entitles his heir to pursue an action of removing?

AT the time of the death of Patrick Lord Elibank, in the month of August 1778, Margaret Hay, lessee of certain lands belonging to his Lordship, had incurred an arrear of more than a year's rent, which devolved to his Lordship's executor.

In the month of September following, George Lord Elibank, heir to Lord Patrick, commenced an action before the sheriff of the county, against Margaret Hay, upon the act of federunt 1756; by which it is, *inter alia*, provided, 'That where a tenant shall run in arrear of one year's rent, it shall be lawful to the heritor, or other setter of lands, to bring his action before the judge-ordinary, who is hereby empowered and required to ordain the tenant to find caution for the arrears, and for payment of the rent for the five crops following, or during the currency of the tack, if the tack is of shorter endurance, within a certain time, to be limited by the judge; and failing thereof, to decern the tenant summarily to remove, and to eject him in the same manner as if the tack were determined, and the tenant had been legally warned in terms of the act 1555.'

In support of this action,

The pursuer pleaded: In order to eject a tenant who had fallen in arrear, a landlord, before the year 1756, was obliged first to attach the whole stocking on the ground, and afterwards to pursue an action of removing against the tenant as being a bankrupt. During this procedure the farm was neglected, the landlord's security diminished, and both parties exposed to much litigation and inconveniency. To remove this was the object of this branch of the act of federunt, by which the tenant's owing a year's rent is made equivalent to bankruptcy, and he obliged in that event, either to find caution for the arrears, and for the rents of the five following crops, if the lease shall subsist so long, or to remove within a short time, to be limited by the judge-ordinary.

It cannot, therefore, be thought, that the landlord's death, and the consequent partition of interests between his heir and executor, should defeat this salutary and politic regulation. By the same rule, supposing

sing a proprietor to dispoise his estate to his son, or his rents to a stranger, or that the rents are attached by legal diligence, a bankrupt tenant might be allowed to retain his possession, and to neglect and deteriorate the lands.

Nor can it with propriety be said, that, by virtue of his hypothec, the landlord is sufficiently secured, if no rent is due to him, whatever may be the extent of the tenant's debts to others. The act of federunt had in view, not merely the landlord's security, but also the cultivation of the ground, which a bankrupt tenant is incapable to accomplish.—Debts due to third parties, not connected with the lease, are not considered; but when a landlord can *subsume*, that one year's arrear of rent has been incurred, both the words and spirit of the act of federunt support him in the requisition therein prescribed.

Answered for the defender: Practice having indulged landlords with an hypothec on the fruits and the tenant's goods for a year's rent, they are effectually secured for that period, if the land be sufficiently stocked; and it is only when more than a year's rent is due to them, that the interposition of the judge is necessary to compel the tenant on this account to find caution, or to remove. Arrears of rent due to the landlord's executor, to his creditor, or to his assignee, the existence and extent of which can be legally ascertained only in a question where they are parties, can no more enter into this computation than extraneous debts. Indeed, if the lease be a beneficial one, nothing could be more repugnant to the interest of the other creditors, than to afford the landlord a mean of withdrawing from them perhaps the only fund out of which they can expect payment.

Upon these principles, the judge-ordinary is directed, by this act of federunt, 'to decern the tenant to find caution for the arrears, and also 'for payment of the rents of the five following crops;' which supposes, that the arrears are due to the same person who is entitled to caution for the rents of the following years. And, on the same idea, it has been found, in an action for declaring the irritancy of a feu-right, *propter non solutum canonem*, That a superior was not entitled to found upon the arrears of feu-duty due to a third party, these having been incurred before he had purchased the superiority; Dictionary, *voce Jus tertii*.

The judge-ordinary had repelled the defences; but the defender having applied by bill of suspension to the Court of Session, upon advising memorials,

'The Lords suspended the letters.'

Lord Reporter, *Kennet*.
Att. Blair, *Hay*.

Att. Solicitor-General *Murray*, *Hay Campbell*, *Law*.
Clerk, *Tait*.

C.

No.

No. CII.

January 20. 1780.

JAMES HERRIOT,

Against

JOHN WIGHT.

Writ.—Devolution to an oversman in a submission, must be completed according to the statute 1681.

THESE parties submitted all disputes between them to James Ronaldson and John Scott as arbiters ; with powers, in case of variance, to elect an oversman. The arbiters differed in opinion, and made choice of Robert Wight, who gave a judgment in favour of Herriot.

In a suspension of this judgment, the Lords found, ‘ That the devolution to the oversman, not being attested by witnesses, in terms of the statute 1681, was void and ineffectual.’

Lord Ordinary, *Alva.*
Clerk, *Tait.*

Act. *Little, R. Dundas.*

Alt. *Maclaurin.*

C.

No. CIII.

February 1. 1780.

JAMES EDMONSTONE,

Against

WILLIAM JACKSON.

Periculum.—When the owners of a ship which has been captured are entitled to abandon it to the insurers.

IN September 1776, the ship Duntreath, belonging to James Edmonstone, was, by William Jackson, insured at the value of L. 1300 from Grenada to Florida, and from Florida to Grenada.

At the date of this policy, the ship had, in prosecution of the adventure,

3 D

venture, arrived at Florida. In its return, it was, on the 29th of November, taken by an American privateer, retaken about five weeks after, and brought to Rhode Island. From Rhode Island it was carried to New York, and there underwent a thorough repair; the expence of which, with the salvage, amounted to L. 658. It remained at New York till January 1778, when it proceeded on its voyage to Grenada; but was again taken by the enemy, retaken, and then carried into Grenada. From the second capture it had received no damage; but no person appearing at Grenada in behalf of the owners, it was appraised and sold by order from the Court of Admiralty there, and the proceeds, which amounted to L. 1045, deposited, after payment of the salvage and other charges, in the hands of the keeper of the Admiralty-register.

Mr Edmondstone sued the underwriter before the High Court of Admiralty in Scotland, 1st, for L. 658, as the amount of the salvage and repairs paid at New York; and, 2^{dly}, for L. 1300, being the whole sum underwritten by the policy; the second capture and recapture, with the proceedings at Grenada, being considered as a *total* loss, and the pursuer being willing to abandon to the defender the proceeds of the ship lodged in the Admiralty-register at Grenada.

To the first conclusion no objection was made; but in bar of the second it was contended by the defender, That the insured was entitled only to the salvage paid to the recaptors, and the other charges, if any, incurred by them in bringing the ship to Grenada.

This question was brought under review of the Court of Session, by an action for setting aside a judgment of the Admiralty Court, by which the insurer's plea had been sustained.

Pleaded for the pursuer: In the language of insurance, a loss is *total* when the plan of the voyage has been deranged, when the property has been altered, or greatly injured. The object of the insured is, to secure himself from every loss which may arise in the prosecution of a particular adventure. This could not be obtained, were he, in such cases, obliged to accept reparation merely of the actual damage, and afterwards to bestow his labour and time in following out a voyage which can no longer be beneficial to him. While a ship in particular remains in the possession of the enemy, the insured is without doubt entitled to recover the value. The subsequent title to restitution, arising from the recapture, which must be made effectual with much trouble, risk, and expence, cannot deprive him of that right, nor reduce him to a worse situation than before; Aitken's Reports, p. 195.; Sir James Burrough's Reports, vol. 2. p. 685 *Goss versus Withers*.

Nearly two years had in this case elapsed between the ship's setting out and arriving at its destined port. In the interval, a loss equal to half the insured value had been sustained, and it had been twice seized by the enemy. It was afterwards sold by the recaptors, by virtue of the powers given to them for that effect. The mode of accounting most agreeable to the principles of insurance, and least liable to dispute, is, that the insurer should come in place of the insured, by the cession here proposed.

Answered:

Answered: The consequences of the first capture and recapture being settled by the parties on the footing of an *average* loss, the question now at issue must depend on the events subsequent to the ship's departure from New York.

Insurance is merely a contract of *indemnification* of the losses therein provided against. The insured are therefore not at liberty, on account of an inconsiderable loss or delay, to throw up all charge of the subject insured, or to neglect any thing to which they would have attended if that had remained at their own risk; Magen's Essay on Insurance, vol. 2. p. 92. 138. 272. 274. 230. 65. 75. 192. 352. Such a conduct would be repugnant to that good faith so essentially requisite in this contract, and could only proceed from an overvaluation, or other circumstance unconnected with the policy, and for which no consideration was given to the underwriter.

In this instance, the owner, or his agent, on the ship's arrival at its place of destination, ought to have claimed it from the recaptors. Upon payment of the salvage, his property was in the same situation as if it never had been seized; as if it had been ransomed for an eighth of the value, or had escaped entirely, with a loss in its rigging to that extent: cases where it is certain no abandon would be permitted. On these principles the Courts of England decided in a case precisely similar to the present; Sir James Burrough's Reports, vol. 2. p. 1198, *Hamilton versus Mendez*. No regard was there paid to the ideal divestiture of property occasioned by a temporary capture; and it was held, that where, without any great delay, or material damage, a ship had arrived at its destined port before any action brought, or any offer to abandon, the insured were entitled only to a verdict for an *average* loss. The cases quoted on the other side were decided on specialties, remarked by the judge who pronounced this decision.

The Court laid out of view the events preceding the ship's departure from New York; and found, 'That in this case the insured
' was not entitled to abandon the ship on account of the second
' capture; and that the insurer was only liable for a partial loss;
' and therefore absolved from the reasons of reduction.'

Lord, Ordinary, *Gordonson*.

A. A. *Hay Campbell*.

Alt. *Blair*.

C.

No.

No. CIV.

February 16. 1780.

WALPOLE and ALISON,

Against

JOHN MONTGOMERY-BEAUMONT.

Tack.—Retention competent to a tenant.

BY a contract of lease entered into between Mr Alexander, proprietor of the coal of Blackhouse, and Mr Montgomery-Beaumont, the latter became bound to furnish 30,000 tons of great coal annually, at the rate of 3 s. per ton, and the whole panwood, under certain restrictions, at the rate of 2 s. per ton. Mr Alexander, on the other hand, obliged himself to make payment at the end of every fourteen days for the quantities of coal delivered during that period.

Mr Alexander run in arrear to a considerable extent, and some time afterwards became insolvent. His estates in Scotland, including that of Blackhouse, were attached by adjudication at the suit of Messrs Walpole and Alison, who, by virtue of this diligence, insisted against Mr Beaumont for delivery of the quantities of coal stipulated in the lease.

Mr Beaumont again contended, That he had a right of retention until the arrears already mentioned should be made up to him.

Pleaded for Walpole and Alison: Rights of retention in favour of tenants are ineffectual against singular successors; Erskine, b. 2. tit. 6. § 39.

Answered: Clauses of retention being inconsistent with the nature of leases, and the utility of the public records, are not preserved by the statute 1449. That principle, however, is not applicable to the present case. Here the pursuers, by insisting on the contract made by Mr Alexander, must subject themselves to the prestations incumbent on him. As he could not require the promised quantities of coal before satisfying Mr Beaumont for what he had already received, the pursuers must be in the same situation.

The Lords found, ‘ That Mr Montgomery-Beaumont is entitled to
‘ retain the coals deliverable by him, and produce thereof, in time
‘ coming, ay and until the sums due to him are satisfied and
‘ paid.’

Lord Ordinary, *Elliot.* Aft. *Hay Campbell*, Solicitor-General *Murray*.
Aft. *Buchan-Hepburn.* Clerk, *Tait.*

C.

No.

No. CV.

February 17. 1780.

WILLIAM REID and others,

Against

STEPHEN MAXWELL.

Cautioner.—Whether, in terms of act 1695, diligence being done within the seven years, a cautioner is liable for annualrents that are posterior.

MAXWELL, as cautioner of Shiells, granted to Reid and others a bond for borrowed money.

Within seven years of its date the bond was registered, and a charge for payment given upon it to the cautioner. But many years had afterwards elapsed, when, Shiells having become bankrupt, an action was brought against the cautioner.

In this action, the question occurred to what extent, in terms of the act 1695, c. 5. the cautioner was liable for the debt; whether he was liable for the principal sum and annualrents only which fell due during the seven years, or farther, for the annualrents of all the subsequent period.

Pleaded for the cautioner: The purpose of the statute is declared in its preamble to be that of preventing debtors from leaving ‘a growing burden on their cautioners;’ and the method by which it has effected this design, is by limiting the time within which any obligation on cautioners can exist. After the lapse of seven years, it is enacted, that cautioners become ‘*eo ipso* free from their obligation;’ nor can any act of the creditor continue it beyond that period, the course of which is not, like that of prescription, subject to interruption; the statutory limitation being in its nature absolute, and not founded on any presumption which is capable of being disproved. If then, beyond the limited period, the obligation itself cannot subsist, it is impossible that any claim of interest can afterwards arise upon it; although with respect to what shall fall due during the seven years, that may no doubt be secured by diligence, which, though done within the period, will have effect after its lapse; for this is agreeable to the object of the statute, which contains a provision to that purpose; Forbes’s Institute, part 2. b. 3. c. 2. tit. 3. § 6.; Lord Bankton, b. 2. tit. 12. § 30.; Erskine, b. 3. tit. 7. § 24.; Dalrymple, February 24. 1714, Mackilliken *contra* Monro; Dictionary, *voce* Prescription, vol. 2. p. 117.; Kilkerran, *voce* Prescription, Irvine *contra* Copland.

Answered for the creditors: It must be admitted, that during seven years cautionary obligations subsist in full force. It has even been

allowed, that diligence done within that period will preserve them beyond it, as far as they then extended. In this case a charge on the bond was timeously given, when the cautioner, in terms of his obligation, ought surely to have discharged the debt; in which case, all the interest that has since arisen on the principal would have been in the creditors' pockets. Having however failed to do what was thus incumbent on him, is he to profit from the omission, by being allowed to retain those annualrents which he could never have touched but by wrongfully withholding payment so long from his creditors? The statute does not countenance such an abuse. Its object was to obviate the danger resulting to cautioners from the creditors delaying to demand payment for a length of time, in which it might have become impossible for the former to operate their relief against the principal obligant. But diligence being timeously done, and cautioners sufficiently protected against that danger, the obligation of course must subsist.

The Lord Ordinary found, ' That the diligence which was done by ' the charge within the seven years, is sufficient to preserve against the ' cautioner the principal and whole annualrents bygone, and in time ' coming till payment.'

The Court, however, after a hearing in presence, altered this interlocutor, and found ' the cautioner liable for no more than the ' principal, and seven years' interest.

Lord Ordinary, *Brasfield.*

A&A. *Matthew Ross.*

Alt. *Cullen.*

S.

No. CVI.

February 22. 1780.

W A L T E R C A M P B E L L.

Against

The CREDITORS of the York-buildings Company.

Proving of the tenor.—Special casus amissionis requisite in proving the tenor of bills of exchange.

MR CAMPBELL insisted in an action for proving the tenor of a bill of exchange for L. 200, drawn by Bishop, one of the York-buildings Company's overseers in Scotland, upon Mildmay, cashier to the Company. That such a bill once existed, did not admit of doubt, nor was there any evidence of its having been retired; but the pursuer
not

not being able to condescend on any circumstance accounting for its disappearance, it was

Pleaded for the creditors of the Company: In all actions of this kind a special *casus amissionis* must be established by the pursuer; otherwise documents might be reared up of a nature and appearance totally different from those which are said to be lost; Bankton, b. 1. tit. 24. § 12. ; b. 4. tit. 29. § 2. ; Stair, February 19. 1679, Swinton *contra* the Laird of Tofts; Erskine, b. 4. tit. 1. § 54. This is especially requisite in the case of bills, where partial payments are generally marked on the back of the voucher of debt, and where the debtor, relying for his acquittance on the delivery or cancellation of the bill itself, does not think it necessary to demand a formal discharge.

The Lords found, ‘ That the pursuer must condescend farther before he is allowed a proof of the tenor and *casus amissionis* of the bill libelled.’

Adv. Hay Campbell, MacLaurin.

Adv. Elphinston.

Clerk, Campbell.

C.

No. CVII.

February 24. 1780.

J O H N T A I T and others,

Against

Sir J A M E S C O C K B U R N and others.

Right in security.—Confirmation.—Whether a real security, as by adjudication, be diminished by a prior confirmation as executor-creditor.

CAPTAIN ADAM HAY having died leaving very considerable debts, Mr Tait, and certain other persons, *expede* confirmations of his moveables as executors-creditors; and his apparent heir brought and obtained decret in a process of sale of his land-estate under the act of parliament.

Afterwards in framing the scheme of division of Captain Hay's funds, a doubt occurred, Whether those creditors who had already attached the moveables by confirmation, were entitled to be ranked upon the price of the heritable estate according to their whole debts, or only for the balance that should remain after deduction of what was to be received from the executry. This point being debated in court, it was

Pleaded

Pleaded for such creditors as had not confirmed: It is true, that when by adjudication a real *lien* is constituted upon an estate, such a *lien* will remain undiminished, notwithstanding partial payments, till the last farthing of the debt is paid. In that case, *unaquæque gleba servit*. Even securities affecting moveables, as arrestments, have a similar effect. But if the payments are prior to the adjudication, that diligence can surely comprehend nothing more than the balance then remaining; otherwise it would involve a *pluris petitio*, which would be fatal to the security.

Now though it be admitted, that the above mentioned decret of sale gives to creditors a real security equal to adjudication; still it is to be observed, that the confirmation in question was prior to this decree; and being a mode by which moveables are actually appropriated, it must then *pro tanto* have operated an actual extinction of the debt.—Confirmation is *aditio hæreditatis in mobilibus*. But though that of an executor-creditor may be considered as a form of diligence; yet in this view likewise it must be allowed, like pointing, completely to transfer the property of the subjects confirmed, and to vest the creditor in them; who is only liable to render an account to the persons interested.

Answered for the creditors who had expedite confirmation: The idea of confirmation being *aditio hæreditatis in mobilibus*, corresponds not to the case of executors-creditors, whose confirmation gives no right to the succession of the deceased, and is merely a form of diligence established by law for the obtaining of payment. It is for this reason that different creditors may confirm the same subject, whilst it is impossible that there can be two heirs of one succession, without being heirs-portioners; Lord Bankton, b. 3. tit. 8. § 65. Nor, though such a confirmation tended as completely as pointing to transfer property, are the funds in this case really carried away. They still remain *in medio*; as they must do, until, after many calculations, and the ranking of all the various debts, it shall appear what shares of them should be allotted to particular creditors.

At first the Court found, ‘ That the creditors who were confirmed
‘ executors were entitled to be ranked on the price of the heritable
‘ estate for their whole debts, without deduction of what they
‘ drew from the executry.’ But, on advising a reclaiming petition and answers,

The Lords altered that interlocutor, and found, ‘ That the creditors
‘ who had attached the executry could only be ranked on the
‘ price of the heritable subjects for the remainder of their debts.’

Lord Justice Clerk, Reporter.
Alt. Swinton, Ilay Campbell.

For creditors confirming, Elphinston.
Clerk, Tait.

S.

No.

No. CVIII.

February 25. 1780.

JOHN GRIERSON,

Against

JOHN RAMSAY.

Arrestment—the habile diligence for affecting the price of heritable subjects in the hands of a trustee for creditors.

JOHN DICKSON, for behoof of his creditors, conveyed his heritable estate to a trustee; and in a deed of accession to this conveyance all his creditors concurred. But the trust-right did not specify the debts, nor was the trustee infest.

One of these creditors was Ebenezer Hepburn; to whom, again, Grierison was a creditor.

After the trust-conveyance, but before the trustee had proceeded to sell those subjects, Grierison laid an arrestment in his hands; and when the sale was over, insisted in a process of forthcoming. In this action he was opposed by Ramsay, in the character of trustee for the creditors of Hepburn, who had likewise become bankrupt; Ramsay objecting that the arrestment was inept, *first*, because it had not been used in the hands of the common debtor himself, but only of his trustee; and, *2dly*, because no moveable effects remained at the time in the trustee's possession; and though he was vested in the heritable subjects, yet that these could not be attached by that personal diligence.

The Court had no difficulty in repelling the first objection; but, with respect to the second, they ordered a hearing in presence on this point, 'How far an arrestment in the hands of a trustee, to whom an heritable estate is disposed for payment of creditors, is a habile mode of diligence to affect the proportion of the price of said estate corresponding to the debts due to any of the creditors, though the estate was not sold at the time of the arrestment.'

Pleaded for Ramsay against the arresting creditor: No heritable subject is arrestable. Prior to the statute 1661, cap. 32. which declared bonds bearing annualrent moveable, except *quoad fiscum et relictam*, such bonds could not be arrested; Durie, July 29. 1634, Laird of Lugton *contra* Creditors of Dishington. And afterwards a particular enactment by the same statute, cap. 51. was necessary to render personal obligations in heritable bonds, even those on which infestment had not followed, subject to arrestment. Now in the present case there exists in the trustee a complete heritable right, though personally vested; and if a special statute was requisite in the above mention-

ed instances, it would certainly be much more necessary, to render an heritable right like this a subject of arrestment; for otherwise every personal right to lands would be arrestable, whereas adjudication is undoubtedly the only mode of attaching such subjects.

Answered: The thing arrested is the interest of Hepburn, a creditor under this trust-right; and all the argument on the other side of the question proceeds on the erroneous supposition of that interest being a share *pro indiviso* in the heritable subjects conveyed. On the contrary, the whole interest of the creditors by the trust-deed resolves into a claim of accounting against the trustee. The case is similar to that of the creditors of a particular partner in a company, who may attach by arrestment their debtor's share in the company-stock, although it be composed of heritable subjects.

Observed on the bench: Were the idea of a *pro indiviso* interest accruing to creditors in the whole estates conveyed to trustees to prevail, it would render the execution of trust-rights inextricable. The effect of the trust-deed now in question was not to give such an interest, but merely to found against the trustee a personal action arising to the creditors from their *jus crediti* in the estate of their debtor, in order to make him account to them for his intromissions. This *jus crediti* could not be affected by adjudication; and therefore is the subject of arrestment; for by one or other of these diligences, a creditor is entitled to attach every estate belonging to his debtor. Accordingly, where the estate of a company is vested in a trustee, arrestment will carry to a creditor a share in that estate, whether heritable or moveable, indiscriminately.

The Lords ' repelled the objections to John Grierison's arrestment,
' and sustained the same as sufficient to affect the dividend of the
' proceeds of the heritable subjects which belonged to Dickson;
' and which proceeds are now in the hands of Robert Maxwell,
' the trustee, effeiring to the debt due by Dickson to Ebenezer
' Hepburn.'

Lord Ordinary, *Gardenston.*

For Ramsay, *Crosbie, Corbet.*
For Grierison, *Ilay Campbell, Alex. Ferguson.*

S.

No.

No. CIX.

February 27. 1780.

Dr ALEXANDER GORDON,

Against

ALEXANDER MILNE.

Personal and Real.—A tack granted by a person having only a personal right, not valid against a singular successor of that person when infest.

Inhibition—not sufficient to secure a right in lands against the granting of tacks.

ISABEL GORDON, heiress apparent to her brother in the estate of Edintore, disposed these lands to Dr Gordon, under the reservation of her own liferent.

Soon afterwards Dr Gordon used inhibition, in order to prevent her from doing any deed to the prejudice of his right thus acquired.

In fact, however, posterior to the inhibition, she let to Milne a lease of the lands for the term of nineteen years; before the expiration of the half of which period she died.

Of this tack Dr Gordon having at length led an adjudication in implement of the aforesaid conveyance, and been infest, brought an action of reduction; and he likewise insisted in a process of removing from the lands.

Pleaded for the defender: When the lease in question was granted, the disposition in favour of the pursuer was merely a latent deed, no infestment, till long after having been taken by him; while, on the other hand, Mrs Gordon was publicly known to have succeeded to her brother in the lands; and therefore the defender is entitled to reap the full benefit of a lease thus *bona fide* obtained by him. For tacks however long their endurance may be, when granted by apparent heirs, like her, *three years in possession*, with whom the lessees have *bona fide* contracted, are unquestionably valid; 27th June 1760, Irvine and Fortune *contra* Knox, Fac. Coll. It is true the pursuer had executed a prior inhibition; but that diligence extends not to the granting of tacks, being limited in its effect to those deeds which touch the property, not merely the possession, of lands; Lord Stair, b. 4. tit. 1. § 2.; Erskine, b. 2. tit. 11. § 2.

Answered: By the disposition in the pursuer's favour, prior to the granting of the lease, the granter's right in the lands was restricted to a naked liferent; the consequence of which was, that the tack could not be effectual beyond the period of her life. The pursuer, it is true, was not then infest; and his right, like that of his author, remained personal; but he had already used inhibition, which was sufficient

ficient to protect it from any encroachment. For as the granting of the tack in question to subsist after the death of the liferentrix, was an exercise of the right of property of which she was divested, and thus a wrong or tortious act with respect to her; so, after inhibition, all *bona fides* on the part of the person deriving right from her is necessarily precluded; and the deed, which it was a wrong in her to grant, becomes, in the construction of law, an equal wrong in him to receive, and therefore is to be reduced *ex capite inhibitionis*. The defender indeed has supposed, that inhibition is not competent to guard against the granting of tacks to the prejudice of the inhibitor's right, as if that diligence could be of any service in such a case as the present, were the right of property nevertheless to be defeated at pleasure by the granting of leases; which it might be as effectually as by any alienation whatever.

The Court, however, seemed not to consider the inhibition as of any consequence in the case; but appearing to rest their judgment on this ground, that the defender, who had derived his right from a person not infest, was not entitled to compete with the pursuer holding in his hands a charter and feizin of the lands;

‘ The Lords decerned against the defender in the actions of reduction and of removing.’

Lord Ordinary, *Elliot*.

A. W. *Stewart*.

Alt. *Elphinston*.

Clerk, *Mackenzie*.

S.

No. CX.

June 14. 1780.

MAGISTRATES of AYR,

Against

QUINTIN MACADAM.

Creditors of a defunct.—Act 1661, c. 24.—Action for setting aside rights granted by an heir within the year after the predecessor's death, endures for forty years. The second clause of this act not confined to rights granted by heirs in a state of apparenacy.

CAMPBELL was debtor to the burgh of Ayr. Within the year after his death, his heir made up titles, and sold lands which had belonged to him. More than three years thereafter, but within forty years, the magistrates of Ayr, for effectuating payment of the debt due to the burgh, brought a process against Macadam the purchaser, for setting aside the sale, upon the second clause of the statute 1661, c. 24.

The

The defences insisted on by the purchaser were, *first*, That the action of reduction not having been commenced within three years after the ancestor's death, was not now competent; and, *secondly*, that the enactment only affected alienations made by heirs when in a state of ap-parency.

For the arguments on the first point, see Lord Kames's Remarkable Decisions, 26th November 1747, Taylor *contra* Lord Braco; Kilker-ran, *tit.* Creditors of a defunct; and Falconer, 9th December 1747, Taylor.

On the second point

The defender pleaded: *The statute founded on, being of a correctory nature, and creating nullities in the titles of landed property, which are undiscoverable from the public records, ought to receive a strict interpretation. It is entitled, 'An act concerning *apparent* heirs.' The preamble sets forth, 'That *apparent heirs* immediately after their an-cestor's death frequently dispoise their estates, in whole or in part, to 'the prejudice of their predecessor's creditors.' The hardship thereby imposed on the ancestor's creditors is said to arise 'from their not 'having it in their power to pursue the heir within *the year*,' which is not applicable to the case where the heir has completed his titles by service. And the enacting clause provides, 'that no disposition made 'by the *said apparent heir* shall be valid, unless made a full year after 'the defunct's death.'

Answered: This statute affects, in the *first* place, diligence by the creditors of the heir, which undoubtedly may take place whether he make up titles by service or not; and, *secondly*, voluntary deeds of alienation by the heir. The title of the statute is general; and as in the first part it must be understood to extend to diligence done against the predecessor's estate after the heir is served, it must in the second be equally applicable to alienations made by heirs in that predicament.

There are in the statute itself expressions which clearly show this to have been the intention of the legislature. Thus it is said, 'that 'apparent heirs do *often* before they are served, make dispositions of 'their predecessor's estate.' And the reason given for the different periods fixed in the first and second clauses is, 'that it would be un-just that the apparent heir, *after he is served, and retoured, and infest, 'respective*, should, for the full space of three years, be bound up from 'making rights and alienations of his predecessor's estate.'

But the defender's argument is not only contradicted by the words of the statute, but is totally adverse to its spirit. As a service may be completed by an heir, in some cases, in fifteen days after the ancestor's death, and in all cases within a period greatly short of a year; the duration of this privilege would in this manner be measured, not by the time prescribed in the statute, but by the diligence used by the heir in making up his titles.

'The Lords repelled the defences.'

Lord Ordinary, Gardenston.

Ast. Geo. Ferguson.

Alt. Raz.

Clerk, Tait.

G.

No. CXI.

June 21. 1780.

CREDITORS of WRIGHT,

Against

WILLIAM KER.

Sequestration.—Act 1772.—Power of a factor on a sequestrated estate, in disposing of the stocking of a farm, before the issue of the lease.

WRIGHT was tenant to the Duke of Roxburgh, by a lease which expired at Whitsunday 1781.

Some weeks before Whitsunday 1780, Wright applied for a sequestration of his effects, under the act of parliament 1772. A factor was appointed, who advertised a roup of the stocking on the 22d of May. Of this procedure Mr Ker, the Duke of Roxburgh's commissioner, complained by bill of suspension; and

Pleaded: A landlord has a right to insist that the farm shall be sufficiently stocked, and to prevent the stocking already introduced from being carried away. And this right of retention, if competent to him against the tenant, must be equally effectual against the tenant's creditors.

Answered: In security of a year's rent, the landlord has a right of hypothec; but in every other respect the prestations claimable by him are of the nature of ordinary debts, and must be made effectual in the common course of legal diligence. Hence the creditors of a tenant are entitled to attach the stocking on the farm, if the landlord's hypothec is not thereby infringed; Erskine, b. 2. tit. 6. § 61. 62. And the right accruing to them from a sequestration, is precisely the same as if each individual had followed out a poinding of the effects falling under that diligence.

‘ The Lords refused the bill.’

Lord Reporter, *Hailes.*
Clerk, *Mackenzie.*

Adv. *Hay Campbell.*

Adv. *MacLaurin.*

C.

No.

G E O R G E S T E W A R T,

Against

Mrs C H A R L O T T E C A M P B E L L.

Aliment—not exigible by an heir of entail from an annuitant on the estate.

JAMES STEWART of Stewarthall executed an entail of his estate, with the usual clauses, and likewise under this condition; ‘ That the heirs of entail should be obliged to apply L. 100 yearly of the rents towards the extinction of the debts with which the estate was affected.’

He afterwards married Mrs Charlotte Campbell; and in virtue of a power reserved in the entail, he settled on her a jointure of L. 130 *per annum*.

George Stewart, though a very distant relation, succeeded as first heir of entail; when he found the situation of the estate such, that, after payment of the jointure, the rents of the lands, which amounted to L. 246, fell considerably short of the other annual burdens. He had no separate funds; nor did he practise any calling to earn his subsistence; for though he had been bred a sailor, and was still a young man, he had withdrawn himself from that way of life.

He therefore claimed an aliment from the widow, as liferentrix of so large a part of the produce of the estate; and having raised an action on that ground, it was

Pleaded for the defender: The defender is by her marriage-contract an onerous creditor on the estate, and is not bound to aliment the pursuer, her debtor. Nor can he claim an aliment from her as liferentrix; for in fact she is not such, being a creditor on the estate for the annuity payable by that contract. At any rate, there is reason to doubt if such a claim made by fiars ever had any proper foundation in the law of Scotland; but certainly it cannot be supported when coming from a healthy young man, able like the pursuer to earn his livelihood by his labour; Erskine, p. 333.

Answered: It is now an undoubted rule, that liferenters are bound to aliment such fiars as are otherwise destitute of any fund of subsistence. It was established in the case of wardholdings, by act of parliament 1491, cap. 25. and has been by practice extended to that of every kind of holding; as it is evident from Dictionary, *voce* Aliment; whence it likewise appears that this claim has never been denied, except either where the heir possessed separate means of subsistence, that in the present case are far from occurring, or where the scanty

scanty circumstances of the liferenter did not admit it; which surely cannot be said of the defender, who has obtained L. 130 of jointure for her tocher of L. 500.

The Court distinguished the case of an annuitant from that of a liferenter, a distinction established in the case of *Mirrie contra Pollock*, July 1731, Remark. Decis.

‘ The Lords therefore sustained the defences.’

Aff. Dav. Rat.

Alt. Hay Campbell.

Clerk, Tait.

S.

No. CXIII.

July 5. 1780.

HENRY RITCHIE, and others,

Against

JAMES WILSON and Company.

Jurisdiction—of the Court of Session, in the first instance, in a question of insurance on a ship.

A SHIP belonging to Wilson and Company, which was insured by Ritchie and other underwriters, having been taken by the enemy, the owners brought an action, in the first instance, before the Court of Session, for recovery of the insured value. The Court repelled all the defences then offered by the underwriters; but when a reclaiming petition and answers came to be advised, the defenders insisted on this new objection, that a question relative to insurance of a ship, being of a maritime nature, ought in the first instance to be judged by the Admiralty-court. The Lords having appointed a hearing in presence on this point, it was

Pleaded by the objectors: Prior to act 1681, cap. 16. the jurisdiction of the High Court of Admiralty was not accurately defined; Stair, b. 2. tit. 2. § 5.; but this statute has declared it to be exclusive in all cases maritime. Nor have the articles of the treaty of Union in any degree diminished the extent of this jurisdiction; *Steven contra Officers of State*, February 10. 1761; *Edmonstone contra Jackson*, February 1. 1780; though Mr Erskine insinuates a doubt in this matter, which he founds on a case in the Court of Justiciary in 1723; whereas in fact no judgment was given in that cause, and it appears from Lord Royston's * Manuscript Notes on Mackenzie's Criminals, in what manner Mr Erskine has been led into a mistake in this particular.

The

* In the Advocates' Library.

The powers of this court are more extensive than those of the English Admiralty. If it can be shown, that the contract or fact which has given rise to the action took place within the body of any county in England, this will exclude the cognisance of their Admiralty-court. In Scotland, on the other hand, the Admiral's territory is less limited than that of the other supreme courts, his jurisdiction being only confined by the nature of the causes to be judged; *Cormack contra Tait*, January 11. 1745, *Falc.*

If then questions relative to policies of insurance on ships be maritime causes, that they fall under the exclusive jurisdiction of the Admiralty-court in the first instance is not to be doubted. Nor can the maritime nature of such contracts be denied, whilst it is apparent from the style of the policies themselves; and none of our lawyers have ever given an enumeration of causes strictly maritime, in which those respecting insurances on ships are not particularly referred to.

As therefore the Court of Session is excluded by express statute from judging, in the first instance, the present cause; so it is evident that no prorogation of jurisdiction can arise from the consent of parties, since the law admits none *de causa in causam*. Were it otherwise, this Court might equally extend their powers to the trial of questions invariably held proper to all the other supreme judicatures, as the Justiciary, the Exchequer, or the Commissary courts.

Answered: Antiently the powers of our Admiralty-court were very much limited. The Admiral then held his courts only at sea, or within flood-mark; and before 1609, cap. 15. horning could not pass on his decrees. At that time the Court of Session, who had a cumulative jurisdiction with him, permitted him to sit among them as an Extraordinary Lord, and then his sentences went out in their name; *Dictionary*, vol. 1. p. 405. *Sinclair*, March 9. 1543, *Lord Bothwell contra Flemings*. The act 1681 no doubt enlarged his powers, and gave him an exclusive jurisdiction in maritime causes. Since the Union, however, his exclusive authority has been considerably diminished; of which the following cases afford satisfactory examples; *March 28. 1707, Forbes*; *Graham contra Piper*, February 25. 1741, *Kilkerran*; *Crosbie contra Corbet*, January 9. 1755, *Facult. Coll.*; *Rowan contra Fleming*, February 8. 1765, *Campbell contra Montgomery*, *ibid.* In these cases, the privative jurisdiction was denied to the Admiralty. That of Long and Macadam, who were charged with committing a murder on the high seas in 1735, likewise deserves notice. Though the Admiral passed sentence of condemnation on these men, the Court of Justiciary interposed, by suspending his Judgment, and the men were set at liberty; which could not have happened, had the act 1681 continued in full force. And the reason of such restriction's being now introduced is, that the Admiralty-court is, by the treaty of Union, rendered subordinate to the Lord High Admiral, or Commissioners of the Admiralty of Great Britain.

The Court of Justiciary indeed appears to have always held a cumulative jurisdiction with the Admiral, as in the case of a lady, *Jacobina Moir*, on whose person a forcible abduction was committed, and likewise in that of *Mungo Campbell*, accused of murder: in both

which instances, though the crime had been perpetrated within flood-mark, the Court of Justiciary tried the cause, and pronounced sentence.

But further, it does not seem that the present question is truly of a maritime nature. A policy of insurance is a contract entered into at land, and which is to receive its execution likewise on shore. Had this question occurred when the Admiral held his courts within flood-mark, it could not have been brought before him; and at this day many disputes may arise concerning policies, to which he is still an incompetent judge; as, for example, that relative to a suspicion of forgery in a policy, or in the subscription of any underwriter. Nay, the present question itself affords a similar instance; for it too respects the vitiation of a policy by the commission of a fraud. At least it must be ranked with those causes which may be tried in either court; such as, what relate to average loss, regulated by the *Lex Rhodia*. In all cases not maritime, Advocation from the Admiralty-court is competent, (as that of Chalmers, 1757); which will always be allowed, except where the pursuer alone, who himself has made choice of the Admiralty-court, seeks afterwards to advocate. But though the Court of Session had been otherwise incompetent, their jurisdiction has been prorogated by the parties litigants; for, having been a radical one, though afterwards limited, it may be thus again extended by consent; *Harcus, voce Suspension*, Brown *contra* Burnet, February 1682; Kames, Remark. Decis. December 17. 1748, Sheriff-clerks *contra* Commissary-clerks; in which last case, one like the present is given as an instance of prorogation.

Some of the judges thought the prorogation effectual to extend the powers of the court, though the cause were strictly maritime, on account of its original jurisdiction, which was not taken away by act 1681. Others, who seemed to deny this prorogation, considered the cause as not maritime; observing, that the criterion of this matter is, whether execution is to fall within the limits of the Admiral's proper jurisdiction.

‘ The Lords sustained their jurisdiction in the first instance, and
‘ adhered to their former interlocutor.’

Lord Ordinary, *Monboddo*.
and *Ilay Campbell*.

A&A. *Crosbie, Scot.*
Clerk, *Campbell*.

Alt. *Solicitor-General Murray*,

S.

No.

No. CXIV.

July 13. 1780.

Dr ALEXANDER WEBSTER,

Against

HAY DONALDSON.

Competition.—A disposition in security, and assignation to the rents of lands, followed by infestment, preferable to an arrestment of these rents.

MR WALKER of Saintford granted to Dr Webster an heritable bond over his estate for L. 2000, containing an assignation to the mails and duties, on which the Doctor was infest, but did not enter into possession, nor intimate the assignation to the tenants.

Another creditor of Mr Walker's was Donaldson, to whom he owed L. 500 by a personal bond, and who used arrestments in the hands of his tenants.

In a process of multiple-poining, a competition ensued between Webster and Donaldson, the one claiming a preference upon his heritable right, the other on the arrestments used by him.

Pleaded for the heritable creditor: The design of this disposition in security, and assignation to the rents of the debtor's lands, was, agreeably to the nature of such a right, to give the creditor a preferable title to the lands for security of the sum lent, and to the rents of them for security of the interest, as it should become due upon that principal sum. This security, having been completed by infestment, which likewise serves the purpose of intimating the assignation, must be effectual; Remark. Decis. November 2. 1748, Creditors of Kelhead *contra* Lady Kelhead. It is true, the property of the lands cannot be attached but by adjudication, so as to be applied for payment of the principal sum by sale or otherwise; nor can the rents be *brevi manu* levied from the tenants, if they refuse to pay, without a process of mails and duties, or of poining the ground. But by neither of these processes is the creditor's right rendered more complete in itself, than before. It is only carried into execution, as the proprietor's own right would be in the same situation; for neither could he *brevi manu* compel payment: and the annualrenter is as well entitled as he to receive voluntary payment.

Answered for the arrester: The right in security, apart from the assignation to the mails and duties, confers no power of levying the rents; Stair, b. 2. tit. 10. § 1. Nor can this assignation be now effectual, as it neither has been intimated, nor has the creditor been in possession; Durie, March 24. 1626, Gray *contra* Tenants. Nay, though

though the assignation had been intimated, it could not avail the creditor; Erskine, b. 3. tit. 5. § 5.

Besides, the rents attached by the arrestments are due for crop 1778; and as the creditor's annualrents for that year are already paid, the rents of the lands for the same year have been disburdened of them.

The Court considered the infeftment on the heritable bond as equal to an intimation of the assignation to the mails and duties; and that the heritable creditor was preferable to the arrefter, not only for the annualrents, but for his principal sum also.

Accordingly, though some of the judges thought there ought to be a distinction on account of the interest for the year, the rents of which were arrested, being already paid, this idea was in general disregarded.

‘ The Lords found the heritable creditor preferable on the rents in
‘ *medio.*’

Lord Ordinary, *Monboddo.*
For Arrefter, *Elphinston.*

For heritable creditor, *H. Erskine.*
Clerk, *Orme.*

S.

No. CXV.

July 14. 1780.

A N D R E W M U R I S O N,

Against

W I L L I A M D R Y S D A L E.

*Runrig.—Small fields disjoined by others intervening, not the subject of the
act 1695.*

MURISON was proprietor of two inclosures situated near the village of Newhaven, one of which contained two acres of ground, the other somewhat less than one. These little fields were separated from each other by another piece of ground, of more than one acre in extent, which belonged to Drysdale; as did likewise a fourth little field, disjoined from this by one of Murison's already mentioned.

Murison sued Drysdale on the act 1661 relative to the inclosing of ground, and on that of 1695 respecting lands lying runrig; concluding in his summons, for straightening marches, and for a division of the grounds.

But the Court, agreeably to the decision, December 7. 1744, Sir John Hall *contra* Alison Falconer, by which it was found, ‘ that
‘ *small*

‘ small parcels of land, surrounded by a greater estate, and lying at a distance from each other, but each parcel lying contiguous, and not run-ridge, did not fall under the act for dividing of run-ridge,’ were of opinion, that the statutes libelled on did not apply to this case, which was neither that of run-ridge, nor of run-dale ; and therefore

‘ The Lords dismissed the action.’

Adv. C. Hay.

Adv. Hen. Erskine.

Clerk, Tait.

S.

No. CXVI.

E O D E M D I E.

HUGH HAY and DAVID LOW,

Against

ANDREW WILLIAMSON.

Communion-elements.—Action of repetition denied against a minister who for twelve years had failed to dispense the sacrament.

MESS. HAY and LOW were heritors of a parish of which Mr Williamson was minister. The latter having failed to administer the sacrament of the Lord's Supper for twelve years, at different parts of the period of his incumbency, the former brought an action against him, concluding for *repetition* of the amount of the communion-element money for those years, in order that it might be applied to pious uses.

Pleaded for the defender: The payment of communion-element money is not to be considered as separate or distinct from the rest of a minister's stipend. The one agrees with the other in every particular. Both are paid out of the tithes, are secured by decree of the commissioners for plantation of kirks and valuation of teinds, are payable at the same terms, and a suspension of a charge given for either can only be passed on payment or consignation of the sums charged for. Both together constitute the legal allowance to a minister for the performance of his ecclesiastical duties; but as of this performance his ecclesiastical superiors only may take cognisance, so he is not amenable for it to any civil court. Those superiors alone can depose him from his ministry; and until deposition take place, for suspension merely is not sufficient, being *ab officio*, and not *a beneficio*, (July 1661, *Ker contra* Parishioners of Carden), he is entitled to receive the whole legal emoluments annexed to that spiritual office. It

is true, that formerly the burden of providing communion-elements was laid on titulars of tithes, who were bound to furnish them as often as they became necessary; but now, in consequence of a particular sum being modified by the court of teinds, and bestowed on ministers, they are the only persons obliged to bear this burden whenever it shall occur, and titulars are for ever relieved from that expence. In this manner, the sum thus allotted, along with the rest of the stipend, becomes properly a part of that legal allowance; and, therefore, if the Court of Session cannot deprive a minister of his sacred function, neither can it strip him of this, more than any other, part of his benefice.

Answered: The payment of a minister's allowance for communion-elements does not correspond to his stipend, as has been argued. It is different with respect to the ann, and to the application of vacant stipends, that allowance falling under neither. As it is appropriated for one particular purpose, which implies the condition of its future application accordingly; so if this condition fail, and the sum be misapplied, a civil action, *condictio causa data, causa non secuta*, will arise; which surely must come within the jurisdiction of this court. Ecclesiastical censure is out of the question; inasmuch, that were it to take effect, the present action for repetition would still be not the less necessary; for the spiritual court could not decern for such repetition. Accordingly in similar cases action has been sustained, to the effect of having the money applied for pious uses; July 21. 1713, Heritors of Abdie *contra* Corfan; June 10. 1742, Heritors of Strathmiglo *contra* Gillespie.

Observed on the bench: Were a minister to dispense the sacrament as often as once every month, no additional claim would accrue to him for communion-element money. On the other hand, though he should not celebrate that ordinance so frequently as once a-year, no deduction on that account from his stated allowance could be required of him.

The Court, however, seemed to view this matter in a different light from that of a refusal to pay communion-element money to a minister who had failed to employ it for that sacred purpose; in which case it appeared that the minister would not have been found entitled to demand it.

‘ The Lords affoizied the defender.’

Act. D. Graeme.

Alt. Robertson.

Clerk, Campbell.

S.

No.

No. CXVII.

July 18. 1780.

Sir GEORGE COLEBROOKE and Company,

Against

WILLIAM and JAMES DOUGLAS.

Bill of exchange.—The oath of an agent to a Company received in supplement of proof arising from a private noting of his own, relative to due negotiation by the Company, of a bill, of which the agent himself was an indorser.

A BILL drawn on a house in London had been indorsed by William and James Douglas in Glasgow to Simon Brown, agent in the same town for Douglas, Heron, and Company, when it was again indorsed to Sir George Colebrooke and Company in London.

The bill being presented to the drawees, first for acceptance, and afterwards for payment, both were refused; upon which Sir George Colebrooke used diligence against William and James Douglas, who brought a suspension of it on this ground, that due intimation of the dishonour had not been made to them.

The chargers, on the contrary, affirmed, that timeous notice of both refusals had been given to the suspenders by Simon Brown, their door-neighbour, being communicated to him by the cashier at Edinburgh, who had received it from London; in support of which averment they produced the cashier's letters to Brown, with a notandum adjoined to each of them in Brown's hand-writing, bearing, that he had read or shown them to the suspenders.

And they contended, that this evidence ought to be held as sufficient; at least, that it might be rendered complete by the oath of Brown.

The suspenders, on the other hand, insisted, that such informal notings were neither entitled to credit of themselves, as they could not be admitted to prove their own dates, nor could they receive any support from the evidence of Brown, who being likewise one of the chargers' indorsers, and subject to their claim of recourse, was plainly a party in the cause.

Answered: Brown had no patrimonial interest in the matter, which he transacted merely as an agent for other persons.

The Court required information concerning the practice of merchants in their manner of intimating the dishonour of bills to such indorsers or drawers as live in their near neighbourhood. This enquiry was made of two respectable banking-houses in Edinburgh,

burgh *, whose answer was to this effect : ‘ When we receive notice
 ‘ from London of the dishonour of a bill indorsed to us by a neigh-
 ‘ bour, our usual way of acquainting him of it, is either by a card or
 ‘ letter. When we make the intimation by a card, we do not think
 ‘ it necessary to keep a copy of it, not suspecting that a neighbour,
 ‘ with whose character we are acquainted, will dispute the intimation ;
 ‘ and knowing, if he should dispute it, that the delivery of the card can
 ‘ be proved by the bearer of it. But if we have any reason to think a
 ‘ greater degree of caution necessary, we make the intimation by letter,
 ‘ and insert it in our copy-book of letters.’

The Lords were of opinion, that the alledged mode of intimating
 the dishonour was sufficiently formal ; and that if the evidence arising
 from the markings affixed by Brown to the cashier’s letters were cor-
 roborated by the oath of the said Brown, this would be satisfactory
 evidence of such intimation. They therefore allowed Brown to be
 examined ; and his deposition confirming the aforementioned allega-
 tion.

‘ The Lords found the letters orderly proceeded.’

Lord Reporter, *Justice Clerk.*

A. Wight.

Alt. Arch. Campbell.

S.

No. CXVIII.

July 19. 1780.

JANET ALLAN, and her younger Children,

Against

The CREDITORS of RICHARD CAMERON,
her eldest Son.

Personal and real.

JOHN CAMERON, the husband of Janet Allan, executed bonds
 of provision, making considerable additions to former settlements
 on his wife and family ; and at the same time he likewise disposed
 his estate to his eldest son, Richard Cameron, under condition, ‘ that
 ‘ Richard should pay all his debts, and make payment to Janet Al-
 ‘ lan, his well-beloved wife, of the different liferent annuities provi-
 ‘ ded to her by contract of marriage and bond of this date, making in
 ‘ whole the sum of L. 100 Sterling ; and likewise to pay to the younger
 ‘ children

* Sir William Forbes, James Hunter, and Company ; and Mansfield, Ramsay, and Com-
 pany.

‘ children the several sums provided to them in a bond of provision, of this date, executed by him in their favour.’

The procuratory of resignation expresses ‘ the burdens, provisions, &c. before written, here also held as repeated *brevitatis causa*, but nevertheless appointed to be engrossed in the infeftment to follow hereupon ; otherwise the same, with all that can follow thereupon, to be void and null.’ And the same clause again appears in the precept of feizin.

The instrument of feizin accordingly specifies those burdens and provisions.

In the wife’s bond of provision too, this declaration is made by John Cameron : ‘ with the payment of which yearly annuity I have burdened my real estate, disposed by me to Richard Cameron, my eldest son, by disposition thereof in his favour of this date, and relative hereto.’

Richard Cameron, after the death of his father, became bankrupt ; and a competition ensued, between his creditors on the one hand ; and on the other, his mother, brothers, and sisters, who contended, that their respective provisions were real burdens on his lands, and entitled to a preference over his other debts. And, in support of that claim, they

Pleaded : From the expressions used in the disposition, and from the above-quoted declaration in the bond of annuity, John Cameron’s intention of making the provisions in question real burdens on the subjects conveyed to his son, is clear and undoubted. Why then should effect be denied to it ? Being specified in the instrument of feizin, the provisions are published by the records, and creditors or purchasers fully put on their guard.

It is true, a personal obligation upon a disponee is different from a real burden on the lands conveyed. But here is, more than a personal obligation, an express order for engrossing the burdens in question in the infeftment, sanctioned with the declaration, that the disposition should be otherwise void.

It is likewise admitted, that no indefinite or unknown incumbrance can be created on land. But though the wife’s annuity only, and not the children’s provisions, are expressed in the disposition, both are alike precisely specified in the infeftment ; and therefore to this case that objection cannot be applied.

Answered : The disposition contains nothing more than a personal obligation on Richard Cameron, without imposing any real burdens on the subjects disposed. This could not be done without specially enumerating such burdens in the disposition or warrant of the infeftment, as well as the infeftment itself, and declaring that the conveyance was granted only under them ; Erskine, b. 2. tit. 3. § 49 ; Bankton, b. 2. tit. 5. § 25. An effectual burden must be specially defined and engrossed ; and it must be *really*, and not *personally* conceived. None of these requisites, however, are complied with in this case ; there being no specification in the warrant of infeftment except as to the widow’s annuity, but only a reference to other deeds, which are personal, and contain no authority for taking feizin ; for the in-

strument of feizin, without its warrant, is to be regarded but as the bare assertion of a notary; February 21. 1765, *Stenhouse contra Innes and Black*, Facult. Coll.

That the obligation is merely personal, appears from the words in which it is conceived; and the order for ingrossing the provisions in the infestment, or their being so ingrossed, can never alter their nature, which must still remain either real or personal, according to the original conception of them; Bankton, b. 2. tit. 5. § 25.

The Lords found, ' That the provisions to the widow and younger children were not real burdens on the estate disposed.'

To this judgment the Court adhered, on advising a reclaiming petition and answers.

Lord Reporter, *Monboddo*.
Jaurin.

For Janet Allan and her children, *Lord Advocate, Mac-*
For the creditors of Richard Cameron, *Ilay Campbell, Craig*.

S.

No. CXIX.

July 20. 1780.

CUNNINGHAME, DOUGAL, and Company,

Against

WILLIAM MARSHALL.

Process.—*Edictal citations in a ranking and sale not being recorded before the last day to which the citations are given, the pursuer may, after calling his summons, let it fall out of the roll and call it anew.*

CUNNINGHAME, DOUGAL, and Company, raised an action of ranking and sale against Marshall. After the legal *induciae* were elapsed, the summons was called by the clerk in the outer house, and a *partibus* marked upon it. It was then enrolled in the regulation-roll for the ensuing week, and called before the Lord Ordinary in the outer house; when appearance was made for the defender, who objected, that the edictal citations at two of the parish-churches had not, in terms of the act of federunt, 1711, being recorded before the last day of compearance.

Upon this the pursuers having recorded the citations, and then filled up a day of compearance in the blank space of the summons, posterior to all the proceedings mentioned, insisted, that there was now no depending process before his Lordship, and declared that they would call their summons of new, and bring it before another Ordinary, as every thing

thing done before the day of compearance so filled up was void. On the other hand, the defender maintained, that the blank space left in the summons was virtually supplied by the calling of the clerk, and subsequent proceedings; and in practice is never, except very rarely, actually filled up; and that a depending process being thus constituted, it was not in the power of the pursuers to make void the proceedings held in it.

The Lord Ordinary pronounced this interlocutor: ' Having considered the foregoing minute, and consulted with the under clerks as to the point of form, *finds*, That there is no dependence sufficient to bar the pursuers from calling again their summons.'

A reclaiming petition against this judgment was refused without answers.

Lord Ordinary, *Hails*.

Act. Mat. Refs.

S.

No. CXX.

E O D E M D I E.

Major ALEXANDER DUNDAS,

Against

ALEXANDER FERGUSON.

Procurator.—A mandate necessary to authorise a claim for a person residing abroad to be enrolled at a meeting of freeholders.

A CLAIM for enrolment was presented to the meeting of freeholders of the county of Ayr, at Michaelmas 1779, in the name of Major Dundas, who was then serving with his regiment in America, but who had given no mandate or commission authorising any person to appear in his behalf on that occasion. An objection founded on these circumstances was made by Mr Ferguson to this claim; upon which the meeting refused to enrol the Major. In a complaint to the Court, offered in his name, it was

Pleaded: The claim was lodged by those who had the custody of the Major's papers. This custody implied a sufficient mandate; Fountainhall, January 10. 1694, King *contra* Seton of Barns.

Answered: In all courts of law it is required, that an express mandate from such suitors or claimants as are out of the kingdom should be produced by those who act in their name; Bankton, b. 4. tit. 3. § 25. 26.; Stair, February 3. 1681, Stewart. Nor does this
requisite

requisite seem less necessary in a meeting of freeholders than in other courts.

‘ The Lords found no claim properly entered entitling to be enrolled.’

Act. Geo. Ferguson

Alt. Alex. Wight.

Clerk, Mackenzie.

S.

No. CXXI.

July 21. 1780.

J O H N and U R S U L A S M I T H,

Against

J A M E S M A R S H A L L.

Clause.—That of ‘ personally liable for the dissoner’s debts,’ how interpreted in a disposition by a father to his son.

J O H N M A R S H A L L, the father of James Marshall, was debtor in a bond granted to John and Ursula Smiths.

Several years prior to the date of the bond, John Marshall had granted and delivered to James, who was his eldest son, a general disposition of his whole estate and effects, real and personal, with the reservation of his own life-rent-right; ‘ and with and under the express burden of ‘ his just and lawful debts which should happen to be addebted, and ‘ owing and resting by him at the time of his decease; with which,’ it is added, ‘ not only the haill subjects above disposed, with this present right and disposition thereof, and all infestments and diligence, ‘ or execution following, or competent to follow thereupon, are and ‘ shall be expressly burdened; but also the said James Marshall and ‘ his forefairs, by their acceptation hereof, shall become personally liable ‘ thereto, and be personally bound in payment of.’

James Marshall, however, did not take infestment on this disposition till several years after his father had granted the bond. In the mean time the latter uplifted debts due to him by heritable bonds, sold one of two tenements which he had in property, and conveyed most of his remaining effects to his other children. Upon his father’s death James was decerned executor, but not *confirmed*; uplifted the debts, and paid the creditors without decree, though not without public intimation in the newspapers.

John and Ursula Smiths then insisted in an action against him on these three grounds: *first*, as being liable for his father’s debt to them *præceptione hæreditatis*, the infestment on the disposition being posterior

posterior to the bond, though the disposition itself was prior; a plea which seemed more agreeable to the object of the law, that of securing creditors, than supported by authorities; *secondly*, as vicious intromitter, from not confirming, and paying without decree; and, *thirdly*, in virtue of the burdening clause in the disposition, especially the words, ‘*personally liable*.’

The Court were unanimous in refusing action on the first ground above mentioned. With respect to the second, they found the defender liable in the sums which the pursuers would have drawn, had they, together with those who received dividends from the defender, been confirmed executors-creditors. But the third was considered as of more difficulty, since the effect of such a clause had not been ascertained by decisions; and therefore the Lords appointed the arguments upon it to be heard in presence.

Pleaded for the pursuers: By the later judgments of the Court it has indeed been found, that dispositions granted ‘with the burden of the disponent’s debts’ do not subject the disponent *ultra valorem* of the subjects conveyed. That condition is calculated to prevent creditors from being laid under the necessity of bringing reductions of such deeds.

A clause, however, declaring the disponents personally liable, is not necessary, nor in fact was it ever designed, for that purpose. On the contrary, it can have no other meaning than to render disponents liable to creditors to the full amount of the disponent’s debts, whether the extent of his effects shall happen to exceed or to fall short of that amount. This distinction is ascertained, and clearly expressed, in the judgment of the Court on the case of Thomson *contra* Creditors of Phin, Stair, December 8. 1675; Dictionary, vol. 2. p. 39.; by which they found, ‘that the clause with the burden of the disponent’s debts, did not oblige Phin *personally*, but as intromitter with the whole moveables *quoad* the value of the whole moveables.’

Such a condition does not subject the disponent to a passive title, seeing it is *ex pacto* that he thus becomes bound; in the same manner as if he were to put on record a bond to that effect. Nor can any words be more clearly expressive of this obligation than those which occur in the present case. If the defender was not to have been bound *ultra valorem*, why was it not so expressed? At least, why are words used of a signification and tendency directly the reverse?

Nor is this contract rendered ineffectual by the defender’s supine negligence, in so long delaying to take infestment on the disposition, which left his father at liberty to make the alledged alienations: for a *jus quæsitum* had already arisen to the creditors from his personal obligation; and this he will not now be allowed to defeat.

Answered for the defender: The pursuers are obliged to suppose, that the terms, ‘personally liable,’ are of the same import with those of ‘universally liable,’ signifying an unlimited obligation to pay the whole debts, however inadequate to them the effects of the disponent might be. Yet these phrases are not more synonymous in law than in common language. To become ‘personally liable,’ admits of a very different and an obvious meaning. For in this manner, personal dili-

gence is expressly permitted against the disponee ; which is more easy and expeditious, and sometimes more efficacious than the real. Such is the sense put on the words in the judgment of the Court, in the case of Clerk *contra* Clerk, Stair, December 2. 1662 ; in which, from the want of these words, it had been questioned whether personal diligence could proceed against a disponee ; whence the purpose of using them appears, contrarily to the idea of the pursuers, to be merely that of obviating doubts of this nature. Of a similar tendency is Kilk. Mercer against Scotland, June 6. 1745.

To deny the pursuers' construction altogether were therefore more reasonable, than to admit it as the only just one ; and surely it is a very moderate conclusion, that the words have not necessarily such a signification. According to this idea the matter resolves into a *quæstio voluntatis* ; but it is one of no doubtful kind. For to enquire, whether it was the meaning and will of the parties, that the defender should become in all events universally liable for his father's debts, is to ask if the father proposed to sacrifice the interest of his son ; and if the son coveted his own ruin.

Besides, as it is admitted, that the burden of the debts was laid on the subjects conveyed, this of itself implies a limitation of that obligation ; and consequently its personal effect must be in like manner circumscribed ; for both are necessarily commensurate.

But were the opposite construction to be admitted, it would not avail the pursuers. The transaction in question was a bilateral contract ; but of which John Marshall, by dilapidating the succession of his son, the defender, failed to perform his part. It being evident then, that the former could not himself, in this situation, have compelled implement on the part of the latter, neither can the creditors of the former acquire from him a right which he himself could never claim. If they have any *jus quæsitum*, it must have proceeded from themselves, not their debtor. But what valuable consideration have they given the defender ? Or what loss have they suffered through his interference ? Besides, as it is not to be doubted, that the father and son were at full liberty to have at any time destroyed the deed without challenge from the creditors, so of course these last could have had no *jus quæsitum*.

The Lords found, ' The defender liable for his father's debts only
' *in valorem* of the heritage and moveables intromitted with by
' him.'

Reporter, Lord Braxfield.
Advocate, Rolland, Honyman.

A.R. Rae, MacLaurin, W. Millar.
Clerk, Tait.

Alt. Lord Ad-
S.

No.

No. CXXII.

July 1780.

JAMES DEWAR,

Against

JOHN AITKEN.

Warrandice.—When incurred.

JOHNSTON, after granting to Geddes an heritable bond over a house belonging to him, sold the house to Aitken.

Aitken in 1756 sold it, with absolute warrandice, to Dewar; and for completing the purchaser's right, assigned to him the unexecuted procuratory in the disposition to himself from Johnston.

Dewar, however, did not take infeftment; and in 1766 was called in an action of mails and duties, by a person in the right of the heritable bond, which had till this period remained a personal deed.—Having been obliged to pay the debt therein contained, he recurred against Aitken, his author, upon the warrandice; who

Pleaded in defence: Where eviction has followed through default of the purchaser, the seller is not bound; l. 56. § 3. *dig. De evict.*; l. 51. § 2.; l. 27. *ibid.*; Dictionary, vol. 2. *voce* Warrandice. From Mr Dewar's delay alone, in not completing his right by infeftment, this debt, with which the seller had no sort of connection, is available against the subject.

Answered: When a purchaser has allowed his right to be defeated, from circumstances occurring after the sale, and no wise imputable to the seller, he has himself to blame. But he is not obliged to get the start of his competitors. It will not, therefore, deprive him of his recourse, that by following out a particular train of management, he might have eluded an incumbrance affecting the subject of his purchase. Hence, by statute 1617, actions of warrandice prescribe only from the term of eviction; whereas if the defender's argument was well founded, as a purchaser in the space of forty years may, by proper steps, secure his right against the whole world, there was no reason for excusing him from the general rule.

The Lord Ordinary found, ' That by the obligation of warrandice, ' Aitken, who sold the subject to Dewar, was bound to clear the ' subject of the incumbrance of the heritable bond granted by ' Johnston, his author, to Geddes.'—And to this judgment ' the

‘ the Lords adhered, upon advising a reclaiming petition for Aitken, with answers for Dewar.’

Lord Ordinary, *Monboddo.*

Aët. *Geo. Wallace.*

Alt. *Rolland.*

C.

No. CXXIII.

August 8. 1780.

R O B E R T G R A H A M, and others,

Against

E L I S A B E T H G R A H A M.

Minor.—A female just twelve years of age, to whom her mother and several other persons had, by her father, been named curators,—at liberty, in opposition to the latter, to accompany her mother to a foreign country, with the purpose of residing there.

MR GRAHAM of Gartmore appointed, as tutors and curators to his children, who were all daughters, ‘ for managing and governing their estate, real and personal, and directing and overseeing the care of their persons and education,’ Robert Graham, his brother, his own wife, the mother of the children, and several other persons.

For some years after his death the children lived in family with their mother; till upon the near prospect of her marriage to a gentleman who resided at Lisbon, it was thought proper that they should be placed at a boarding-school in Edinburgh. The eldest of them, Elisabeth, was then drawing near to the legal age of puberty, that of twelve years. On the fifth day after she had attained it, she addressed a letter to her guardians, informing them of her resolution to accompany her mother, and not to go to the boarding-school, adding, that by law she was now become mistress of her own person.

A majority of the guardians, alarmed at this message, presented a bill of suspension to the Court, praying ‘ for an interdict against Miss Graham from going, and against her mother, and every other person, from carrying her out of its jurisdiction.’

Pleaded for the suspenders: Experience shows, that in order to render the general rules relative to the age of puberty, which our law has borrowed from that of the Romans, consistent in this northern climate with reason and propriety, these rules must suffer such a controul and limitation as are suited to the circumstances which really prevail. It is a power inherent in the supreme court to regulate their application,

application, whether with respect to the marriage or place of residence of minors. Of the former, the case of Niven *contra* Cuming, March 6. 1688, is an example. Of the latter, it does not appear that circumstances so extraordinary as the present have before occurred to produce one. No child of twelve years of age has till now insisted on being carried away from her native to a foreign country.

But the same authority has been exercised by the Court, on the same principle, in cases analogous to the present. If it is supposed, that minors immediately after puberty have the disposal of their own persons, it is equally admitted, that, when not prevented by the father's nomination, they may chuse their own curators. Yet in the case of Bower, July 29. 1750, Kilkerran, *voce* Minor, in which a young man of fourteen years of age, had, by some Popish relations, been carried over to the Scots College at Paris, where a scheme was formed by them of getting the management of his estate by his nomination of them as his curators, the Court authorised the nearest agnate, who had been his tutor of law, to recover the person of the minor, and to bestow such expence out of the minor's funds as might be necessary for that purpose. The principle on which the Court interfered was, according to the remark of the learned collector, 'That where-ever there is a suspicion of undue management, or of imposition on the minor, it is competent for the Court, *ex officio*, to prevent undue influence, to sequestrate the person of the minor for some time, as in the case of Sir Robert Gordon, observed by Forbes.' In this case, indeed, not only the minor's power of nominating his own curators was controuled by the Court, but they gave directions also for regulating the place of his residence.

Though the law has fixed the age of puberty at an early period, and in general has annexed to it a power in minors of disposing of their own persons; yet, when their safety or advantage requires the interposition of the Court in the controul of this power, it is not to be withheld. In the present instance, the removal of a young lady to a distant and a foreign country, would be attended with such consequences as call for the protection of the Court to the unexperienced person who is thus threatened with them. This application the suspenders are more particularly entitled to make, that besides being, along with the mother, nominated tutors and curators by the father, they have specially conferred on them 'the care of his children's persons and education;' and thus possess all the authority which he himself would have if he were in life.

Answered: There is no doubt in our law at what period pupillarity ends and minority begins. Nor is the maxim less unquestionable, that '*tutor datur personæ, curator rei*;' whence arises the free disposal of the persons of minors by themselves in marriage, and surely not less the free choice of their place of residence, which is of such inferior importance, and so evidently implied in the former. A pupil indeed has no person in a legal sense, and tutors must act for him. But by the common law, and prior to the statute 1696, as soon as the years of pupillarity were past, minors were free to act for themselves; nor could their fathers, or any other person, impose curators on them,

except as a condition of a gift proceeding from themselves ; and then the administration of these curators was confined to the special subject granted ; so far were they from obtaining any controul over the persons of minors ; December 10. 1675, Scot *contra* Kennedy,—Dirleton. Neither does that statute alter the nature of curatory ; it only gives to the father the power of nominating curators as well as tutors. The persons of minors are still exempt as before from the curatorial authority, and in particular with respect to their place of residence ; July 25. 1741, Marshall *contra* Macdowal, Kilkerran. The case of Bower, reported by the same collector, proceeded, notwithstanding the opinion of that learned judge, altogether upon the statutes 1661 and 1700 relative to Popery. Nor does that of Niven afford any instance of controul upon the choice of a minor in marriage, but of the punishment of a crime, and the redress of a wrong.

This minor then possesses the right of disposing of her person as she pleases, and, in particular, by chusing her place of residence. Her curators are not entitled, from any notions of expediency, to controul her. Yet, were it otherwise, it would still be incumbent on them to show that there is any impropriety in a daughter accompanying or living and receiving her education under the care and protection of an affectionate mother, whose character is irreproachable.

Observed on the bench : The law of Scotland has not conferred on curators that controuling power over the persons of minors which is here claimed ; and the *nobile officium* of the Court ought never to be at variance with the law. Indeed the measure of which these curators complain, appears not to be attended with any real hazard to the young lady.

The Lords ‘ repelled the reasons of suspension, and removed the ‘ interdict.’

To this judgment the Court adhered, on advising a reclaiming petition and answers.

Reporter, Lord *Braxfield*.
Alt. *Crosbie*.

For the suspenders, *Solicitor-General Murray*, *Ilay Campbell*.
Clerk, *Tait*.

S.

No.

No. CXXIV.

August 10. 1780.

ISABEL MEARNS,

Against

REBECCA GIBBON.

Aliment—not due by a father's representative.

REBECCA GIBBON, the widow of John Mearns by a second marriage, was his universal disponee. Isabel Mearns, who was his only child, and born of the former marriage, pursued her for an aliment. The latter was then upwards of fifty years of age, a widow also, and had formerly received her portion from her father.

The Court appointed the pursuer to give in a condescence of her age and circumstances, from which it appeared she was able to earn the means of subsistence by her labour. But as they considered a claim for aliment, though competent against parents, or other very near relations, *super jure naturæ*, not to be transmissible against their representatives, by which it might be extended very far indeed; this appeared to be the ground upon which

The Lords ‘affoizied from the claim of aliment.’

A&A. Buchan-Hepburn.

Alt. Hay.

S.

No.

No. CXXV.

August 10. 1780.

DUGALD CAMPBELL,

Against

NEIL MACGIBBON and COLIN CAMPBELL.

Bill of exchange.—An indorsation to a bill, the drawer and acceptor of which live in the neighbourhood of each other, falls under act 1696.

DUGALD CAMPBELL, Macgibbon, and Colin Campbell, were, among several other persons, creditors of Archibald Fletcher. In December 1778, some of these last-mentioned persons used diligence against him; and Dugald Campbell then charged him upon letters of horning. In the following month Fletcher indorsed to Macgibbon and Colin Campbell, who lived in the same neighbourhood with him, two bills towards payment of the debts which he owed to them. In the beginning of March thereafter, and within sixty days of the date of the indorsations, Dugal Campbell executed a caption against Fletcher, by incarcerating him. He then brought a process against Macgibbon and Colin Campbell, concluding, upon the act 1696, for reduction of these indorsations.

Pleaded for the pursuer: The act 1696 declares ‘all and whatsoever voluntary dispositions, assignations, or other deeds, which shall be found to be made and granted, directly or indirectly, by the debtor or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days before, in favour of a creditor, either for his satisfaction or farther security, in preference to other creditors, to be void and null.’ This statute, then, is not confined to dispositions and assignations alone, but extends to all other deeds, by which, whether directly or indirectly, or whether, for the satisfaction or farther security of a particular creditor, the bankrupt endeavours to give him a preference over the rest. Accordingly it has been found by the Court to reach the case of the actual delivery of moveables; Dictionary, vol. 1. *voce* Bankrupt. And, on the same principle, it would seem that payment in current money should in like manner be comprehended.

But the present argument is independent of that matter; because an indorsation to a bill is very different in its nature from actual payment in cash. The latter is an immediate extinction of debt. The former does not in itself extinguish debt, and may not even be the means of doing it. It is the payment thereby obtained which extinguishes a debt. Bills indeed in the hands of an onerous indorsee are often compared to bags of money, free from all exceptions, and in particular the claim

ceptions, and in particular the claim of compensation. But however just the comparison may be in some respects, it surely does not follow, that it must equally hold in all; as, in particular, that because the delivery by a debtor to his creditor of a bag of money equivalent to the debt extinguishes it, the indorsation to a bill should have the same effect, though it may very well happen that a bill for the largest sum may not produce a single farthing. Although, therefore, it were granted, that actual payment is not within the sanction of the statute, and though it were likewise admitted, that bills indorsed for present value are without that enactment; still it is clear, that bills, like those in question, indorsed in satisfaction or security of prior debts, are comprehended under it, and are void; February 2. 1700, *Durward contra Wilson*, Fountainhall; January 16. 1713, *Campbell contra Graham*, President Dalrymple; Lord Bankton, b. 1. tit. 13. § 28.

Answered: Bills in the possession of onerous indorseees are free from every exception or restraint which do not appear *ex facie* of them, without any distinction from their onerosity arising out of present or prior value. In particular, they are exempted from the claim of compensation; Kilkerran, *voce* Bills, February 1. 1749, Thomson; Sir John Douglas *contra* Elliot, January 7. 1757, Fac. Coll.; and if so, they should as little be liable to the exception of the act 1696. Accordingly, as payments in money do not fall under this statute, so neither do indorsations to bills of exchange; August 1. 1760, *Bean contra Strachan*, Fac. Coll.

The Court considered cases of this kind as different from those in which the debtor and creditor live at a great distance from each other, and where payments could not be easily made, except by the intervention of bills. In that case, the bills would not have fallen under the act 1696; but to sustain indorsations such as the present, made by one neighbour to another, it was observed, might tend in a great measure to defeat the purpose of that statute.

The Lord Ordinary had found ‘ the bills subject and liable to be reduced upon the act of parliament 1696; and the defenders liable to repeat the payment of them, which they had received, for behoof of the pursuer, and the whole creditors of Fletcher.’

To this interlocutor ‘ the Lords adhered.’

Lord Ordinary, *Monboddo*. Act. *Cullen*. Alt. *Ilay Campbell*. Clerk, *Campbell*.

S.

No. CXXVI.

August 11. 1780.

T H O M A S R O B E R T S O N ,

Against

R O B E R T P R E S T O N , G E O R G E C A M P -
B E L L , and A L E X A N D E R M E L V I L L .*Jurisdiction.—The civil courts have none in matters of ecclesiastical concern.*

THE Reverend Mess. Preston and Campbell, ministers, and Mr Melvil, on of the elders, of the parish of Cupar, in their capacity of members of the kirk-session, had resolved that, on account of certain alledged immoralities, Mr Robertson ought not be admitted to participate of the sacrament of the Lord's Supper; and had engrossed this resolution in their records. On that ground, Mr Robertson brought against them an action of defamation before the Commissary of St Andrews, concluding for a palinode, and for damages. In a process of advocacy which followed, it was

Pleaded for the defenders: That being an ecclesiastical court, they were not subordinate to any civil one, but to their ecclesiastical superiors alone; and that even supposing their proceeding to have been improper, yet having acted in their judicative capacity, with which they were by law invested, and not as individuals, they were not to be accountable for an error in judgment.

Answered: This is an action brought for reparation of an injury. It has been occasioned by scandal and defamation, a matter proper to the cognifance of the consistorial, and not belonging to the ecclesiastical courts. These last have no powers to give to the party injured, redress by palinode, money, or otherwise.

The Lords adhered to the Lord Ordinary's interlocutor, 'remitting
' the cause to the Commissary, with this instruction, that he re-
' fuse a proof as to what these defenders said or acted at the meet-
' ing of the kirk-session, or in their collective capacity.'

Lord Ordinary, Hailes.

A&A. G. Wallace.

Alt. Wm. Robertson.

S.

No.

No. CXXVII.

November 13. 1780.

L O R D M A C D O N A L D,

Against

A L E X A N D E R M A C K E N Z I E-M U I R.

Recompence.—Whether any remuneration be due to a tutor, who had, to the advantage of the minor, at his own risk, made a purchase for him of a landed estate.

DURING the minority of Sir James Macdonald, Mr John Mackenzie, who was doer for the family, and one of Sir James's tutors, purchased, for behoof of the pupil, some lands which were interspersed with his. As this measure, though extremely advantageous to the pupil, could not be pursued by Mr Mackenzie in his character either of agent or tutor, the purchase was carried into execution in his own name, and the money for payment of the price borrowed on his credit. It was however ratified by the other tutors, and by Sir James himself when he came of age.

Sir James Macdonald was succeeded by Lord Macdonald, who brought an action against Mr Mackenzie, concluding for his being obliged to account for his intromissions, and to divest himself of the lands purchased by him. In this litigation Mr Mackenzie demanded a remuneration on account of the risk undertaken by him in making the purchase; and this demand, after his death, was continued by Mr Alexander Mackenzie-Muir, his universal disponent, who

Pleaded: In completing this transaction, which was uncommonly beneficial to the minor, Mr Mackenzie underwent a very great degree of hazard. His personal credit was endangered, and in the event of any disorder arising in the fortune of the pupil, might have been much hurt. Had the bargain, from a defect in the rights of the seller, or from any other circumstance, proved a losing one, it was in the power of Sir James Macdonald, or his heirs, to have reprobated it altogether. It is consistent with equity, that so singular an exertion should meet with a proper reward; and it is much for the interest of persons under age, that by a gratification, such as is here demanded, their guardians should be incited to advance their interests.

Answered: The execution of the office of tutor, which is undertaken from the honourable motives of friendship and benevolence, although meriting a grateful return, is incapable of a pecuniary estimation; and the obligation by it imposed on the pupil, cannot, without a total derogation from its nature, be enforced by a court of law.

Such

Such was the idea of the Roman law ; and no instance can be shown in the practice of this country where a demand of this nature was ever thought of.

The Court were of opinion, That the claim was of that imperfect nature which could not be ascertained by a court of law. And it was likewise observed, that, by encouraging tutors to enter into hazardous transactions, the fortune of persons under age might be exposed to great danger.

‘ The Lords found no remuneration due.’

Lord Ordinary, *Gardenslon.*

A&. *Maclaurin, Crosbie.*

Alt. *Ilay Campbell.*

C.

No. CXXVIII.

December 4. 1780.

R O S S - M ‘ K Y E,

Against

N A B O N Y.

Removing.—Act 1756. In considering the value of the stocking on a farm, as sufficient for the landlord’s security, cattle admitted to pasture, not being subject to the hypothec, are not computed.

NABONY possessed a farm belonging to Mr Ross-M’Kye, which consisted of several large inclosures laid down in grass, and instead of stocking it with cattle of his own, admitted those of others to pasture on it.

Mr Ross-M’Kye, apprehensive that in this manner his right of hypothec would be rendered ineffectual, it being understood that cattle so taken in were not subject to it; Erskine, b. 2. tit. 6. § 63.; Dictionary, vol. 3. *voce* Hypothec; brought an action of removing, on this ground, against the tenant.

The defender urged the propriety of the measures adopted by him, as agreeable to the nature of the subject let, and the practice of the country; and farther insisted, that the value of his property on the farm was fully adequate to the landlord’s security.

Of this last averment a proof was allowed: in which the defender having failed,

‘ The Lords decerned in the removing.’

Lord Ordinary, *Braxfield.*

A&. *Maclaurin.*

Alt. *D. Armstrong.*

C.



DECISIONS

DECISIONS

OF THE

COURT OF SESSION.

No. I.

December 5. 1780.

JOHN BARNES,

Against

JOHN HAMILTON.

Member of Parliament.—Evidence of the old extent. Discrepancy in the descriptive and valent clauses of the retour.

AT the Michaelmas head-court of the county of Ayr, in 1780, Mr Barnes claimed to be enrolled on the *four merk-lands* of Shaw, part of the barony of Glenmuir; and, in order to prove the old extent of these lands, produced a retour of James Earl of Queensberry, dated 20th May 1640, in which they were described as of that value.

Upon summing up the extents of the different lands composing the barony, as specified in the *descriptive* clause, it appeared that they did not amount to more than L. 15:3:4; whereas the *valent* stated the whole, *in cumulo*, at L. 16:6:0. From this discrepancy, it was *objected* by Mr Hamilton, That the retour could not be sustained as sufficient evidence of the old extent of the claimant's lands. This *objection* having been brought under the review of the Court of Session, it was

Pleaded for Mr Barnes: By the uniform practice of the court, ever since the decision in the case of the Lennox retour, about forty years ago, a discrepancy of that sort, arising from an excess in the valent, has been held not to detract from the faith of the retour: For the cause of this excess must always be, either an error in

A

calculation,

calculation, or else the omission of some of the lands, or their being stated at too low a value, in the descriptive clause. In the present case, therefore, the discrepancy might, indeed, give some room to suppose that the old extent of the lands in question may have been a few shillings above four merks, but is plainly inconsistent with its having been below that value.

‘ The Court repelled the objection.’

Act. *G. Ferguson.*

Alt. *Wight and Ja. Boswell.*

L.

No. II.

December 5. 1780.

JAMES M'LEAN,

Against

JOHN SWORD.

Pañtum illicitum.—Sale of smuggled goods.

SWORD purchased, *within land*, from M'Lean, some brandy and coffee-berries, of which the latter was not the importer. The goods, not being accompanied with a permit, were soon afterwards seized by the officers of the revenue; and, in fact, it appeared that the duties had not been paid for them. M'Lean brought an action for payment of the price against Sword, who

Pleaded: That this being a smuggling, and therefore an illegal contract, could afford no ground of action in a court of law; agreeably to the decision in the case of M'Lure and M'Cree *contra* Paterfon, 26th February 1779.

Answered for the pursuer: In the case referred to, action was indeed refused for the price of brandies imported in unenterable casks, and purchased *at sea*, within the limits of a port. But it would be dangerous to extend this principle to such cases as the present, where goods have passed, on shore, from hand to hand: For thus it would be in the power of every retail customer to plead that objection, to the great embarrassment and prejudice of trade.

The court admitted the distinction, and adhered to the judgment of the Lord Ordinary, ‘ Repelling the defences, and finding the ‘ defender liable,’ &c.

Lord Ordinary, *Alva.*

Act. *Armstrong.*

Alt. *Wm. Stewart.*

Clerk, *Tait.*

L.

No.



No. III.

December 6. 1780.

WILLIAM BROWN,

Against

JOHN HAMILTON.

Member of Parliament.—Ascertainment of valuation at a meeting appointed by the Lord Ordinary on the bills. Year and day infest. Test of the writ.

BBROWN having acquired right to certain lands in the county of Ayr, applied to the convener of the commissioners of supply, praying him to call a meeting, for the purpose of ascertaining their valuation. This the convener at first declined to do; but, afterwards, in answering a protest taken against him, he promised to advertise such a meeting, to be held on the 18th of October, *i. e.* two days after that appointed for the election of a member of parliament for the county.

Mr Brown concurred in a bill of advocacy, with some other gentlemen in similar circumstances; and the Lord Ordinary officiating on the bills, 7th October 1780, 'in respect there was not time for appointing the bill to be seen and answered in common form, refused to advocate;' but appointed the commissioners of supply, or any five of their number, to meet at Ayr on the 12th current, and to proceed directly to divide and ascertain the valuation of the lands belonging to the complainers. A quorum of the commissioners accordingly met, and found it proved that the valuation of Mr Brown's lands amounted to L. 471 : 5 : 2 Scots; which they ordered to be entered in the cess-books, and certified by their clerk.

Mr Brown claimed to be enrolled at the meeting for election on the 16th; when it was *objected* by Mr Hamilton,

1mo, That the meeting of the commissioners on the 12th was irregular, and, therefore, their decree did not afford sufficient evidence of the claimant's valuation: And,

2do, That the claimant's infestment having been recorded on the 7th October 1779, and the writ for calling a new parliament, bearing date the 2d September 1780, he had not been infest a year before the *test* of the writ; and, therefore, in terms of the statute of the 12th of Queen Anne, was not entitled to be enrolled, so as to give his vote at the election.

A majority

A majority of the freeholders having sustained these objections, and refused to enrol, Mr Brown complained to the Court of Session; and,

With respect to the first objection, pleaded : From the proof led by the complainer, it appeared that the lands contained in his charter stood valued in the cefs-book at L. 471 : 5 : 2 Scots; and the meeting of commissioners, on the 12th October, having proceeded to ascertain that valuation, precisely in the manner prescribed by the Lord Ordinary, their decree, as certified by the clerk, afforded all the evidence required by law in such cases.

Answered : The commissioners of supply cannot proceed, either to divide a *cumulo* valuation, or to ascertain the different lands to which such *cumulo* is applicable, except either upon the day of meeting named in the act of parliament, from which they derive their powers, or at an adjourned meeting, or at a general meeting properly summoned by the convener: So it was determined, 21st February 1753, Abercrombie *contra* Leslie; and 9th January 1754, Cunningham *contra* Stirling. And the only regular mode of calling such a meeting, is by an edictal citation at every parish church within the county, on a Sunday, given under the authority of the convener; as was decided in the House of Lords, 6th March 1770, Dundas of Dundas *contra* Wardrope of Cult; and the same Mr Dundas *contra* Robert Durham.

The power of the Court of Session to review the proceedings of the commissioners is not disputed. But here there was no proceeding to be brought under review. The matter advocated was the exercise of an office, not the sentence of a judge.

Even where there is room for an advocacy, an intimation to the commissioners, and all concerned, is necessary. Nor has the court been in use to authorise a meeting of any number of commissioners, without giving to every commissioner in the county an opportunity of attending. In the case of Malcom, and others, *contra* the Commissioners of Supply of Kirkcudbright, 4th August 1757, the convener was appointed to call a general meeting. In two other cases, Earl of Panmure, and others, *contra* the Commissioners of Supply of Forfar, 15th November 1766, and Duke of Gordon *contra* the Commissioners of Supply of Banff, 13th December 1772, the collective body of commissioners had been regularly brought into court; the convener was ordered to call a general meeting; and it was only upon his non-compliance, that the commissioners, or any five of their number, were, *afterwards*, authorised to proceed in the business. These interlocutors were judicial intimations to all the commissioners; and it was their own fault if they did not attend.

But here the Lord Ordinary, *de plano*, and without any intimation, either to the convener, or to the commissioners at large, appointed a particular day and hour for expediting the business the complainer had in view; and authorised any five of the commissioners to proceed in the matter. No intimation of this order was made, till the moment that the complainer, and a few of his friends, whom he had called together, were going into the court-house; of course nobody attended,
except

except themselves ; the meeting was partial and illegal ; and the proceedings must be considered as totally null and void.

Replied : Divisions were formerly in use to be made by any two commissioners ; but, as improper liberties were sometimes taken at these private meetings, the court found it expedient to check them ; and hence the decisions, *Abercromby contra Leslie*, and *Cunningham contra Stirling*.

The decision of the House of Lords, *Dundas contra Wardrop*, does not prove the *illegality* of a meeting not intimated *on a Sunday*. In that question, the proceedings laboured under other more capital defects. The meeting consisted of only three commissioners ; and it was called in name of one, who had declared by letter, that he did not consider himself as vested with the office of convener.

But here the case is very different. The complainer's valuation is ascertained by a *full quorum* of commissioners, acting under the immediate authority of the Court of Session ; to which an appeal, by advocacy, is equally competent for *delay of justice*, as for *iniquity*.

Nor was there any occasion for intimating the meeting to the whole commissioners of supply, who were not *parties* but *judges*. And, accordingly, in the case of *Forfar*, no such intimation was made or required. But, supposing there had been parties interested in the *cumulo*, who were not called, the division would not be *void* ; it would only have been *reducible*, in case they could shew that iniquity had been committed.

Upon this point, some of the judges thought that an *opposite* party ought to have been in the field, in order to give validity to the judicial procedure. But, as it was not alledged that the commissioners had done any wrong, and as they had precisely followed the mode pointed out by the Lord Ordinary, *the court repelled the objection*.

With regard to the *second* objection, *pleaded* : The clause in the act of Queen Anne referred to, is virtually repealed by the act of the 16th of George II. This last statute enacts, ' that no singular successor ' shall be enrolled, till he be publicly inest, and his seizin registered ' *one year before the enrollment*. ' By it, the right of being *enrolled* necessarily implies the right of *voting*. The roll of *freeholders* is, in the language of the legislature, the roll of *electors* ; and, setting aside personal disqualifications, every person upon the roll is entitled to vote at an election. Agreeably to this doctrine, the court determined a similar case, 17th January 1755, *Buchanan of Carbeth contra Cunningham of Ballindalloch*.

Answered : As the act of the 16th of Geo. II. expressly repeals one part, (viz. § 4,) of the 12th of the Queen, it is presumeable, that, if the legislature had meant to repeal any other clause of this statute, it would have done so in terms equally explicit. It is, no doubt, a maxim of universal law, that *leges posteriores priores contrarias abrogant*. But a direct repugnancy, or inconsistency, is necessary to the application of this maxim ; and, where both enactments can subsist, a repeal of the

former is not to be presumed; Blackstone, *Introduction*, § 3. The act of George II. does not say, that *every* singular successor, whose seizin has been registrated a complete year, *shall be* enrolled. Its aim was to limit the right of singular successors in a *particular* respect; and it is not from thence to be inferred, that *another* limitation, imposed by a former statute, was meant to be removed. The two statutes are directed to different objects. The first was intended to prevent an improper multiplication of votes at an election; the last to obviate a similar abuse at the ordinary meetings of the freeholders. Both of them have their use; and they are in no shape derogatory from one another.

Upon this point, it was observed on the bench, that a judgment so long acquiesced in, as that in the case of Buchanan *contra* Cunningham, was not now to be overturned.

The Court, therefore, ' Found the freeholders did wrong in refusing to admit the complainer upon the roll;' and ordered him to be enrolled accordingly: To which judgment they adhered, upon advising a reclaiming petition and answers.

The like judgment was given, *codem die*, in the case of Sir Walter Montgomery-Cunningham, who had obtained a *division* of his valuation before a similar meeting of the commissioners.

Lord Ordinary, Covington. Alt. G. Ferguson and Ilay Campbell. Alt. Wight and Crosbie.

L.

No. IV.

December 6. 1780.

MARY PATERSON, and others,

Against

JAMES BALFOUR.

Fiar.—Right taken to a man and his wife in conjunct fee and liferent.

BY contract of marriage between John Sword and Jean Glasgow, Sword became ' bound to provide, and have in readiness, of his own proper means and effects, the sum of L. 500 Sterling; which, ' with

‘ with the sum of L. 360 Sterling of *dote* or *tocher* with the said Jean Glasgow, extending both to the sum of L. 860 Sterling, *besides and over and above* the lands hereafter likewise disposed by the said Jean Glasgow,’ he obliged himself, his heirs and successors, to employ upon good security, and to take the rights thereof in favour of himself and the said ‘ Jean Glasgow, his future spouse, and longest liver of them two, in conjunct fee and liferent, for the said Jean Glasgow, *her liferent-use allenarly*, in so far as extends to the liferent-provision or annuity conceived in her favour, as particularly after mentioned.’ The provision here referred to, was a free liferent-annuity of L. 50 Sterling, which, with the conquest of the marriage, in case of no children, and the half thereof if there should be children existing, she accepted in full of all she could demand.

‘ For the which causes, and on the other part, Jean Glasgow bound herself, her heirs, and successors, to make due and lawful resignation of all and haill the eight shilling-land of old extent, of the lands of third part of Giffan, &c. in the hands of her immediate lawful superiors thereof, in favour, and for new infestment to be made and granted to the said John Sword and Jean Glasgow, in conjunct fee and liferent, and to the children of the marriage between them in fee.’ Then followed a procuratory of resignation, and an assignation of Jean Glasgow’s moveable subjects; after which the contract provided and declared, ‘ That the *liferent* of the said lands of third part of Giffan, *which by this contract is provided to the said Jean Glasgow*, in case she shall survive the said John Sword, and that there shall be children, one or more, of the marriage, at the time of the dissolution thereof, shall impute in payment, *pro tanto*, to her, of the liferent-provision of L. 50 Sterling, conceived in her favour, as before mentioned.’

John Sword died without issue. His relict, within a year of his death, was confirmed executrix-dative; and in that character brought a multiple-pointhing against her husband’s creditors. She afterwards sold the lands of Giffan, and conveyed the price to Mr Balfour, as trustee, for behoof of herself and her relations. Upon her death, it became a subject of competition between the creditors of her husband and the trustee, in which it was

Pleaded for the creditors: Wherever there is any difficulty in determining whether a husband or his wife is *fiar*, the fee is presumed to be in the husband, as the *dignior persona*; and so the court have decided in a variety of cases, Dict. *voce Fiar*; Dirleton, Stair, 19th June 1667, Johnston *contra* Cunningham; Dalrymple, 21st November 1705, Creditors of Earnshaw; Forbes, 23d July 1713, Edgar *contra* Sinclair; June 1727, Edgar *contra* Edgars; Stair, 12th July 1671, Gairns *contra* Sandilands; Marcus, contracts of marriage, 20th December 1682, Ramsay *contra* Ramsay; Fountainhall, 19th January 1697, Laws *contra* Tod; July 1720, competition betwixt the creditors of Elliot of Northsonton and Elliot of Borthwickbrae.

In the present case, the circumstances tending to shew that the fee was meant to be in the husband are very strong. The whole that Jean Glasgow possessed was no more than a moderate tocher: And, accordingly,

accordingly, both her money and her lands were conveyed by the contract, *nomine dotis*, and in consideration of the provisions made upon her; Sword obliging himself to lay out the L. 860 Sterling upon good security, ' besides and over and above the lands hereafter disposed.'—The destination is absolute to *the children of the marriage*, without any substitution in favour of the wife's heirs; and, had the succession once been taken up by children of the marriage, the heirs of the father, not those of the mother, must have succeeded to them.—The subsequent clause, declaring, ' that the *liferent* of the lands, *which by this contract is provided to the said Jean Glasgow,*' should impute in payment, *pro tanto*, of her *liferent*-provision, clearly demonstrates, that her right was only a *liferent*, and that the *fee* was completely made over and vested in the husband.

Answered: Matters must be very equally balanced, indeed, before a fee can be found to be in the husband, merely as the *dignior persona*. Neither do the decisions quoted support any such doctrine. In the case of Johnston, 1667, the subject was money lent by the husband, which could not belong to the wife, *stante matrimonio*. In the case of the creditors of Earnshaw, 1705, the termination was to the husband's heirs and assignees whatsoever; and to them the wife bound herself in absolute warrandice, reserving only her *liferent*. The decision, Edgar *contra* Edgars, 1727, proceeded on the same principle. And in that of Edgar *contra* Sinclair, 1713, the subject being moveable, fell to the husband *jure mariti*. The case, Gairns *contra* Sandilands, 1671, was a very singular one; but there, a little bit of land being all that the wife brought with her, was provided to the longest liver in fee. The husband survived; yet his daughter, making up titles by precept of *clare*, as heir to her mother, and possessing the subject found to have belonged to her father, was dispossessed from the passive title. In the case of Ramsay 1682, the subject was a sum of money, of which the conjunct fee was not even nominally provided to the wife. The case of Laws, 1697, was very special, and turned upon a question of substitution; but the decision did not necessarily imply that the fee was in the husband. And in that of Elliots, 1720, as stated, it appears, that the last termination was to the husband, his heirs, and assignees, whatsoever.

But in all questions of this nature, it is principally to be attended to, who is the party to whom the subject belonged before marriage; for *there* the fee must still remain, unless the contrary clearly appears.—The words *conjunct fee and liferent*, import no divestiture; and Jean Glasgow, by settling her lands in this way, did certainly not give up the fee, or limit her original right to a *liferent*.

The clause wherein the money and land are classed together, as conveyed *nomine dotis*, must be explained and limited by the terms in which these different subjects are afterwards made over. The bonds and bills are assigned absolutely ' to John Sword, his heirs and assignees ' whatsoever; ' and he is bound to take the new securities ' to himself ' and his future spouse, in conjunct fee and *liferent*, *for her liferent-use* ' *allenary*.' And, had it been intended to vest the fee of the lands in him,

him, it is presumeable, that the right of his wife would have been limited in a similar manner.

It was altogether unnecessary to insert any substitution in favour of the wife's heirs. For the fee remaining in her necessarily devolved to her heirs, failing of children of the marriage. And, had such children existed, they could have made up their titles in no other way than by special service to her, the person last infeft in the subject.

Neither is it of the smallest consequence, that, if the succession had once been taken up by the children of the marriage, the lands would afterwards have gone to the heirs of the father, in preference to those of the mother. This is owing to the genius of our law, which admits no succession through the mother of the deceased. But those circumstances which regulate the succession after the failure of the first heirs, can have no influence in determining where the original fee was vested.

Nor is it more material, that, in one part of the contract, Jean Glasgow is said, *obiter et narrative*, to have the liferent of the lands provided to her. This, though certainly true, was not sufficient to deprive her of the fee inherent in her. It was plainly an *usus fructus causalis*, which belongs, *optimo jure*, to every fiar, and which is not in the least repugnant to the idea of a fee in its purest signification ; Clerk Home, No. 1. Frog.

Replied: It is a principle maintained by every writer on the Law of Scotland, that, where a right is taken to a husband and wife, in conjunct fee and liferent, and their heirs, the husband is the sole fiar ; ' unless the provision bear expressly a power in the wife to dispone ; ' Stair, b. 3. tit. 5. § 51. And even ' though the right have flowed ' from the wife, yet, if it was given her in name of tocher, the fee is ' in the husband ; since whatever is given in tocher is the property of ' the husband ; Erskine, b. 3. tit. 8. § 36.

Observed on the bench: That, if the subject in question had appeared to have been settled *nomine dotis*, the fee would have been in the husband ; but, as a separate sum of money was provided in name of tocher, the presumption in favour of the husband did not hold.

The court adhered to the interlocutor of the Lord Ordinary, finding,
 ' That the fee of the lands was in Mrs Sword, and not in her
 ' husband ; and, therefore, that the price of said lands is not af-
 ' fectable by his creditors.'

Lord Ordinary, Stonefield.

For the creditors, Hay Campbell and Alexander Abercrombie.
 Att. G. Wallace.

L.

No. V.

December 7. 1780.

ANNE DICKSON,

Against

ALEXANDER DICKSON.

Fiar.—A bond taken to a father in liferent, and to his son in fee. Cautio Mutiana.

JAMES DICKSON, several years before his death, executed a deed, settling his heritable subjects upon his son Alexander, with a substitution in favour of his daughter Anne; reserving his own and his wife's liferent, and a power to alter and burden as he thought proper. By the same deed he nominated his son, whom failing, his daughter, to be his sole executor or executrix.

Soon after the date of this settlement, James sold his lands of Milltown: And, a few weeks before his death, he took a bond from the purchaser, in whose hands L. 600 Sterling of the price still remained, in favour of himself and his wife, and longest liver of them in liferent, for their liferent-use allenary, and in favour of their son, his heirs, executors, or assignees, in fee; 'without prejudice always to the said James Dickson, of suing, and using all manner of execution and diligence, at any time in his lifetime, upon this bond, after the aforesaid term of payment, he shall see fit; and uplifting and discharging the principal sum, annualrent, and penalty foresaid, notwithstanding he is only provided to the liferent, as aforesaid.'

Anne, the daughter, had been married previously to the date of the first of these settlements, and had L. 300 Sterling provided to her in name of tocher; but her contract of marriage, to which her father was a party, declared, 'That she should still remain a bairn of her father's house, and should have her legal share of his means and estate at his death, notwithstanding the above tocher.'

Upon James's death, his daughter and her husband brought an action against Alexander, for payment, *inter alia*, of L. 400 Sterling, as the share she was entitled to of her father's effects, in virtue of her right of *legitim*: And, in the course of this action, the following question occurred:

Whether the defender, as executor, was accountable for the L. 600 bond above mentioned?

Pleaded for the pursuers: It is a point, *triti juris*, that, where a father takes a right to himself in liferent, and to his child in fee, the fee

fee still remains in the father, unless the tenour of the deed clearly shew a contrary intention. In the present case, it is evident that the father did not mean to divest himself of the fee in favour of his son, but had the bond so conceived, merely to save expence in making up titles after his death; for he, at the same time, expressly reserved to himself a power 'To uplift and discharge the *principal sum*, notwithstanding he was only provided to the liferent.' It is clear, therefore, that the sum in this bond remained under the father's power till the last moment of his life; and that, while he lived, any right which his son had was pendent and defeasible.

But such is the nature of the right of legitim, that it operates with full energy the very moment the father ceases to exist; and, in some respects, even anticipates that period. Thus, no deed by the father, of a testamentary nature, or revocable, can so far divest him of the property, as to disappoint or diminish the right which every unforl-familiated child has to a share of the goods in communion; Erskine, b. 3. tit. 9. § 16. The bond in question, therefore remaining *in bonis* of James Dickson till his death, was from that moment subject to the pursuer's legal claims upon his executry.

Answered: The defender does not claim an exclusive right to the L. 600 in question, in virtue of any deed, either of a testamentary or of a revocable nature, but in consequence of the fee vested in him by a bond, which could not be revoked. From the moment that bond existed, his father had no more than a liferent-right, which ceased at his death; and the fee, which had all along been in the defender, continued burdened with the liferent provided to his mother, who survived her husband.

The clause in the bond, authorising the father to do diligence upon it, is of no consequence. It was properly thrown in, to prevent any dispute that might arise, in case it should be found expedient, for the security of all concerned, to insist for payment, while the defender, an officer in the army, might be abroad, or not present, to concur in the discharge; and, had his father uplifted the money, in consequence of the power so reserved to him, he could, perhaps, have been compelled to lend it out anew, on the same terms. But this case did not exist; the defender's right of fee remains untouched, and entire; and, the bond still subsisting, it is not to be concluded that the debt *must* fall under the executry, merely because it *might* have done so, had the bond been discharged.

Observed on the bench: As there was no obligation upon the father, in case he should uplift the money, to re-employ it in the same way, the *substantial* fee remained in him.

The Lords found, 'That the sum in dispute made a part of the di-
' visible funds, in the present accounting for the pursuer's legi-
' tim.'

In the same action, another question arose, from the following circumstance: A debt appeared to be due by the father to one Hamilton, who had not been heard of for many years. The question, therefore,

fore, was, Whether the defender was entitled to retention of a sum equivalent to that debt?

Pleaded for the pursuers: The existence of Hamilton's debt being very uncertain, it ought not to be sustained as a burden upon the executry. The pursuers are willing to find caution to indemnify the defender; and this expedient has been adopted by the court in similar cases; Durie, 17th March 1636, Weir *contra* Arnot.

Answered: The defender is clearly entitled to set apart, out of the executry, a sum corresponding to this debt. The caution offered by the pursuer, however unexceptionable, does not afford perfect security, or preclude the *possibility* of the defender's being disappointed in his relief. If even the debt should never be demanded, the defender, as executor, is entitled to reap the whole benefit arising from the creditor's neglect.

The Lords found, ' That the defender was not bound to pay to the
' pursuers any part of the sum stated as due to William Hamil-
' ton, on their finding caution to repeat.'

Lord Ordinary, *Elliot*. Act. *William Wallace*. Alt. *Wight*. Clerk, *Orms*.

L.

No. VI.

December 7. 1780.

A N D R E W G R A Y,

Against

The M A G I S T R A T E S of D U M F R I E S.

Prisoner.

I N an action against the magistrates of Dumfries, for not receiving and incarcerating a prisoner for debt, duly presented to one of their number, by a messenger, it was

Pleaded in defence: 1mo, The town of Dumfries being the head-borough of a border-county, where debtors attempting to escape from the one country to the other are daily apprehended, it had been their immemorial custom to require the creditor-incarcerator to fix a domicile within the borough, at which intimation might be made, in terms of the statute 1696, c. 32. 'Anent the aliment of poor prisoners.' And this demand not having been complied with in the present case, the magistrate who refused to receive the prisoner was justified by the practice of the borough, however *erroneous* it might be; Dict. *voce* *Con-*
suetude, vol. 1. p. 203.

2do, The

2do, The prisoner was a notour bankrupt; he had no heritable estate; his moveable subjects were under sequestration; and payment could not have been operated by the *squalor carceris*. The pursuer, therefore, has suffered no damage by the supposed *culpa* of the magistrates, and, of course, can have no claim against them on that head; Erskine, b. 3. tit. 1. § 14. Late case, Gillies *contra* Walkers.

Answered: Did such a practice as that alledged by the defender really exist, it would be very unnecessary and improper. It is, however, sufficient to observe, that the law supposes that, by the *squalor carceris*, payment may be obtained: And this is the foundation of ultimate personal diligence. It is not the part of a magistrate to retard the execution of that diligence, upon any pretence. If, in breach of his duty, he does so, he must answer for the consequences.

The court, without entering into an investigation, either of the alledged practice, or of the other circumstances, were of opinion, that the magistrate, in refusing to aid the diligence of the law, was *culpable*, and therefore *adhered* to the judgment of the Lord Ordinary, which was,

‘ Repels the defences; and finds the defenders liable in the contents
‘ of the bills pursued for.’

Lord Ordinary, *Braxfield*.

Aēt. *Maclaurin*.

Alt. *Crosbie*.

Clerk, *Menzies*.

L.

No. VII.

December 8. 1780.

JOHN SYME,

Against

CHARLES NAPIER, and others.

Bona fides.—Impressing of ship-carpenters apprentices.

IN June 1779, Captain Napier, then regulating the impress-service at Leith, sent a numerous press-gang, who surrounded the yards and docks of John Syme ship-builder, and carried off twenty-seven of his work people. Syme repaired immediately to the rendezvous, and claimed them as his apprentices; producing, at the same time, their indentures; all of which, except two of a late date, had been indorsed by Captain Napier himself, on former occasions. Captain Napier, however, refused to release them, and ordered them to be put aboard a tender, which set sail with them next morning. But the Lords of the

D

Admiralty,

Admiralty, upon an application from Syme, and understanding that the Lord Chief Justice of the Court of King's Bench had granted writs of *habeas corpus*, sent the whole apprentices back to Leith in a sloop of war, except two, the period of whose apprenticeship was expired, and who voluntarily entered into his Majesty's service.

Mr Syme brought an action of damages against Captain Napier, Lieutenant Younghusband, an officer employed in the impress-service, and Lieutenant Scott, the commander of the tender ; for whom it was

Pleaded in defence : The power of impressing men to serve in war is a prerogative of the crown, founded on necessity. The exercise of it, so far as relates to the royal navy, appears from the antient commissions granted to the High Admirals of England, and from the opinion of lawyers treating of such subjects.

That all *needful artificers*, and all whose occupations necessarily connected them with ships, were formerly liable to be impressed, is evident from the commission granted by Queen Elizabeth to Sir Martin Frobisher ; from another issued in the 50th of Edward III. ; and from that of Lord Seymour, in the time of Edward VI. These commissions, and many others, are cited by Sir Matthew Foster, in his argument upon the case of Alexander Broadfoot ; and the learned judge observes, that all the High Admirals, since the Restoration, have had powers equally ample conferred upon them.

The trade of a ship-wright is, by its nature, inseparably connected with the navy ; and, in every treatise relative to marine regulations, carpenters are specially enumerated ; Justice's Sea Laws, p. 297. ; Wellwood's Abridgment of Sea Laws, tit. 30. ; Cay's Abridgment of the Statutes, *voce* Seamen ; and Molloy, *De Jure Maritimo et Navali*, in his chapter ' Of the right of pressing,' expressly mentions carpenters as liable to be impressed.

The circumstance, that the apprentices were afterwards returned, is no evidence that Captain Napier exceeded his powers, because they were so returned in the way of favour, and without any legal compulsi-
tory.

Accordingly, it has been generally understood, that ship-carpenters may be impressed, as well as other sea-faring people. And, in particular, as to Mr Syme himself, at the commencement of the present impress-service, when it was advertised, that all persons liable to be impressed should receive protections, upon furnishing one man out of five, he, amongst others, accepted of these terms. When employed to build the Fury sloop of war, for government, he applied to the Commissioners of the Admiralty, and obtained protections for his journeymen and apprentices, during their continuance in that service. Upon the commencement of hostilities with Spain, he again, by way of compromise, furnished one man out of ten to the royal navy. And that, at all times, he considered his apprentices as having no other protection or exemption than what arose from their indentures, is evident from his getting Captain Napier to indorse those indentures, and from the grounds of a protest which he took upon the present occasion.

When,

When, therefore, Captain Napier received the most positive orders, from the Admiralty, issued, indeed, *on the spur of the occasion*, but afterwards ratified by act of parliament, to disregard all protections, he was certainly *in bona fide* to believe that he had a right, and that he was even obliged, in the exercise of his duty, to impress the apprentices in question. It was equally his duty, at a time when the exigencies of the state required such a supply, to send them off immediately for England.

The defence of *bona fides* has always been sustained in similar cases; Fountainhall, 30th November 1703, Fairholm *contra* Warrander; Forbes, 27th July 1710, Lamb *contra* Cleland and Gibson; Dict. *voce Bona fides* and *Consuetude*. In a question between the defender and one Mr Chalmers, respecting an impressed apprentice, the court sustained this defence, and assolizied. There the court were of opinion, that the only circumstance by which the *bona fides* could be removed, was an express and immediate offer to prove, that the apprentice had not been at sea before the date of his indenture. But here Mr Syme did not, by any such offer, or even averment, take off the natural presumption arising from the profession of his apprentices; and, therefore, has no legal claim of damages against the defenders.

Answered for the pursuer: The original instructions issued by the Lords of the Admiralty, empowered Captain Napier 'to impress as many seamen, sea-faring men, and persons whose occupations and callings are to work in vessels and boats upon rivers, as he shall be able.' By this last description are meant persons navigating lighters, barges, fishing or passage boats, and other vessels that ply on rivers; but by no means carpenters, who are said, technically, to work, not *in*, but *upon*, a vessel. Ship-carpenters, therefore, under these instructions, are not liable to be impressed till they go to sea, and so fall under the designation of *sea-faring men*.

Nor were Captain Napier's powers, in this respect, enlarged by his later instructions, which authorized him 'to impress as many seamen, sea-faring men, and other persons described in the press warrants, as he possibly could, without regard to protections,' &c. Here the original description is still adhered to; and if ship-carpenters, who have never been at sea, are not impressible at common law, neither were they by the terms of these instructions.

The private opinion of the pursuer, or his taking protections for his men from those whom he saw invested with power, does not bar him from appealing to the violated laws of his country; and his founding principally upon the indentures, in his protest against Captain Napier, does not exclude his availing himself of other arguments.

The proof of the apprentices never having been at sea before they were impressed, does not rest upon the pursuer. The rule of law is, *affirmanti incumbit probatio*.

The Lord Ordinary had found, 'That ship-carpenters, who have only wrought at land, in building or repairing ships, but never have been employed in their vocation at sea, are not, in terms of the press-warrants, *seamen, or sea-faring men*;' and, of consequence, are not impressible. Several of the judges had doubts upon this point; but,

as

as the defender had acquiesced, the question turned principally upon the effect of his *bona fides*.

Observed on the bench: The *bona fides* of a public officer mistaking his duty, can have no farther effect than to limit the claim of damages to what is necessary for the indemnification of the injured party. The *onus probandi* in this case clearly lies upon Captain Napier.

The pursuer passed from insisting against the two Lieutenants, who had been affoizied by the Lord Ordinary, as having acted under 'the orders of their superior officer, which, by the rules of the navy, they were obliged to obey.' The judgment therefore was:

'Find Captain Napier liable to the petitioner in damages and expences.'

To which the Lords adhered, on advising a reclaiming petition for Captain Napier.

Lord Ordinary, *Monboddo*. Act. *Crosbie*. Alt. *Murray*, *Solicitor-General*. Clerk, *Colquhoun*.

L.

No. VIII.

December 9. 1780.

G E O R G E F E R G U S S O N,

Against

M U N G O C A M P B E L L.

Member of parliament.—Oath of trust and possession.

AT the meeting in 1780, for election of a representative to serve in parliament for the county of Ayr, Mr Fergusson, a freeholder standing upon the roll, moved, 'That Mr Campbell should take the oath of trust and possession; and required the said Mr Campbell, whom he saw in court, to take the same; whereupon Mr Campbell withdrew, and Mr Fergusson further moved, 'That, in terms of the act of parliament, (7th Geo. II. c. 16.) he should forthwith be struck off the roll.'

The answer made was, 'That Mr Fergusson's request cannot be complied with, because Mr Campbell has not *refused* to take the trust-oath. All the law requires is, that Mr Campbell take that oath before he proceed to vote; and, when he comes to vote, he, no doubt, will

‘ will take the oath mentioned. But, till then, he is not bound to remain in court longer than he pleases; nor can he be struck off the roll *till he actually refuses to swear.*’

The meeting having, ‘ by a majority of voices, repelled the objection, and refused to strike the said Mungo Campbell off the roll,’ Mr Fergusson protested, and afterwards brought the judgment of the freeholders under review, by petition and complaint.

At advising, the court required Mr Campbell to say positively, whether or not he was present when the oath was tendered? Mr Campbell, by his counsel, admitted that he was present; and the court

Found, ‘ That the respondent having wilfully absented himself, after the trust-oath was desired to be put, is to be held as refusing ‘ to take the oath;’ and therefore granted warrant for expunging him, and found him liable in expences.

Adv. Nairne.

Adv. Wight, and Jas. Boswell.

Clerk, Tait.

L.

No. IX.

December 12. 1780.

SAMUEL MITCHELSON, Senior, *Writer to the Signet,*

Against

SOPHIA, LADY CRANSTON, and MICHAEL
LAD E, Esq; *her Husband.*

Husband and wife.—Money advanced for aliment of a family, and a voucher taken for it from the husband, is the husband's debt, and the creditor has no claim against the wife, although she succeed to a separate estate.

LORD CRANSTON had a considerable estate, both in England and Scotland, and his Lady, after her marriage, succeeded to an estate in the West Indies, which had belonged to her father, and to the liferent of which she was entitled; but, after this succession opened to Lady Cranston, Lord Cranston's affairs became so much involved, that his creditors brought a judicial sale of his Scots estates.

During the dependence of the sale, Lord Cranston was much pinched for money; his family resided then in Edinburgh; and Mr Mitchelson, from time to time, advanced sundry sums for the use and aliment
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of the family; for which, on settling accompts with Lord Cranston, in May 1771, he took his Lordship's bill.

The price at which Lord Cranston's Scots estates sold fell short of paying the debts preferably secured upon them. The English estate was so settled, as that it could not be attached for Mr Mitchelson's debt; and Lord Cranston having died, Mr Mitchelson brought an action against Lady Cranston and Mr Lade, to whom her Ladyship was married after Lord Cranston's death, concluding for payment of the sum in Lord Cranston's bill, as being advanced on the credit of the Lady, and applied for the maintenance of her family.

Pleaded for Lady Cranston and her Husband: Mr Mitchelson's taking Lord Cranston's bill shows he considered this as Lord Cranston's debt; which it clearly was, as every husband is bound to aliment his family. Such debts cannot affect the wife, as wives are not liable for husband's debts. Lady Cranston had no separate estate at the time these sums were advanced; therefore the pursuer must be presumed to have made the advances on the credit of Lord Cranston, and he can only affect his estate for the same.

Answered for the pursuer: He was not Lord Cranston's man of business, but was employed by Lady Cranston to look after her interest, while Lord Cranston's affairs were in confusion. It was on Lady Cranston's credit he made these advances, by which the debt in question was contracted; for, although Lady Cranston had not got possession of the West India estate at the time these advances were made, yet it was then certain she must succeed to it; as, in fact, soon after, she did; and it was on the faith of Lady Cranston's repaying the money that it was advanced. Sundry letters of Lady Cranston's were produced, to show that this was the case; and that, even after the bill had been granted by Lord Cranston, Lady Cranston had promised to pay the debt.

Replied for the defenders: The letters founded on by the pursuer were impetrated from Lady Cranston by her husband Lord Cranston. They infer no obligation on Lady Cranston; nor could do so, even if a promise had thereby been made to pay the debt, as a woman clothed with a husband can come under no valid obligation to pay the husband's debts.

Both parties quoted sundry authorities, in support of their different pleas.

The Lord Ordinary found, ' That the debt pursued on was the proper debt of the late Lord Cranston, and that the defender, his widow, ' is not legally bound to pay the same; therefore sustained the defences, and assolzied.'

The pursuer reclaimed to the court; and, on advising his petition, with the answers, ' the Lords adhered.'

A^t. John Swinton, David Rae.

Alt. Alex. Elphinston:

Clerk, Tait.

No.

No. X.

December 13. 1780.

WILLIAM MARSHALL,

Against

Messrs CUNNINGHAM, DOUGAL, and Company.

Conventional penalty.—Obligation ad factum præstandum.

MESSRS CUNNINGHAM, Dougal, and Company, lent Mr Marshall L. 2000 Sterling upon a security over some subjects in Glasgow, and also a mortgage on an estate in the island of Tobago, the property of Mr Marshall; and, by the indenture or contract then entered into, Mr Marshall ' engages and binds himself, his heirs, &c. ' to ship on board such vessel or vessels belonging to the said Messrs ' Cunningham, Dougal, and Company, at Tobago, annually, the whole ' crop of sugar, rum, and other goods arising from the foresaid estate, ' to their address, and consigned to them, until the foresaid debts be ' completely extinguished, satisfied, and paid; as also, for that period, ' to send from Britain, by their vessels, the whole goods and provisions ' which he may have occasion for in that island; and to pay in to the ' said Messrs Cunningham, Dougal, and Company, their heirs, &c. ' the usual freight and commission therefor: And, in case the said Wil- ' liam Marshall, or any other person or persons, shall dispose of all, or ' any part of the foresaid crops on the island of Tobago, or consign ' the same, or send out goods and provisions to that island, otherwise ' than above stipulated, the freight thereof, and commission, as aforesaid, ' shall be paid to the said Messrs Cunningham, Dougal, and Company, ' in the same way as if these vessels had carried these goods, and been ' consigned as aforesaid.'

Cunningham, Dougal, and Company sent a ship to the West Indies, on board of which they expected to receive the produce of Mr Marshall's Tobago estate; but, upon the ship arriving at Tobago, it was found that no part of the produce of Mr Marshall's estate remained to be shipped on board Messrs Cunningham, Dougal, and Company's ship, it having been sent off by Messrs Campbells of Tobago, who had a mortgage on that estate, and consigned by them to Millikin, Hunter, and Company, merchants in Port Glasgow.

There being no freight to be had for Messrs Cunningham, Dougal, and Company's ship at Tobago, the ship was sent to Grenada, and there loaded a cargo of rum for Britain; and by this voyage there was considerable loss.

Messrs Cunningham, Dougal, and Company, brought an action against Mr Marshall, concluding for payment of freight and commission

sion for the produce of Mr Marshall's Tobago estate. to the extent of what the same had amounted to, as ascertained by the accompt of sales made by Messrs Millikin, Hunter, and Company, to whom the same had been consigned.

Pleaded for Marshall : The stipulation in the contract between him and Messrs Cunningham, Dougal, and Company, about freight and commission, could only be considered as a *penalty*, which ought not to have effect beyond the real damage. The ship sent out by Cunningham, Dougal, and Company, had brought home a loading from the West Indies, though, perhaps, not a full loading. All that Marshall could be liable in was the difference, or waste freight, which was the *lucrum cessans* to Cunningham, Dougal, and Company, to which the penalty in the contract ought to be restricted ; and, to construe the obligation in the contract otherwise, would be giving Messrs Cunningham, Dougal, and Company double freight for their ship, and making them gainers by having missed the consignment of the produce of Marshall's estate.

Answered for Cunningham, Dougal, and Company : The contract is express. If the crop of Marshall's estate is not consigned to Cunningham, Dougal, and Company, and put on board their vessel, the same freight and commission is to be paid as if it had been consigned ; which agreement is neither contrary to law nor equity, and ought not to be departed from ; *l. 7. § 7. ff. de pactis*. This was no penalty stipulated to enforce performance of an obligation, where, in case of failure, the party is still bound to perform, and, on account of his failure, to pay a sum over and above. In such a case, the sum stipulated on failure is considered as a penalty, and restricted to real damage ; because the person in whose favour the obligation is made is still entitled to demand performance of the original obligation. Here Marshall was bound, *ad factum præstandum*, to consign the produce of his estate to Cunningham, Dougal, and Company, and to put it on board their ships ; and, in case of failure, he was bound, in lieu of the fact he ought to have performed, to pay the same freight and commission as if the stipulation had been complied with, and is thereby liberated from performing it. This was nothing more than substituting one obligation in place of another, and cannot be considered as a penalty ; it is a sum fixed upon by the parties to be the rule in settling between them, if the obligation is not performed ; and is subject to no restriction, agreeable to the rule of the civil law, § 7. *Inst. de verborum obligationibus*. The distinction between this case, and that of a penalty to enforce an obligation, is explained in Principles of Equity, b. 3. c. 2.

The judgment of the court was :

- ‘ In respect William Marshall failed to implement his part of the
- ‘ contract, although Messrs Cunningham, Dougal, and Company,
- ‘ fulfilled their part thereof, the Lords find Mr Marshall liable to
- ‘ Messrs Cunningham, Dougal, and Company, for the freight
- ‘ and commission claimed upon the cargo consigned by Messrs
- ‘ Campbells of Tobago to Millikin, Hunter, and Company, of
- ‘ Port Glasgow, in the same way as if it had been consigned to
- ‘ Messrs

‘ Messrs Cunningham, Dougal, and Company, in terms of the
‘ contract ; and remit to the Ordinary to proceed accordingly.’

For Mr Marshall, *Ilay Campbell, Matthew Ross.* Alt. *William Craig.* Clerk, *Tait.*

No. XI.

December 22. 1780.

WILLIAM INNES of Blackbills,

Against

Poor JOHN CLERK.

Removing.

MR INNES set to Clerk, for 19 years, after Whitsunday 1770, certain lands, at a stipulated rent. A tack was extended, and Clerk entered into possession ; but, having fallen into arrear of rent, Innes, in January 1779, raised a process before the sheriff, concluding for the arrears of rent, the sum of which was specially mentioned in the summons, which also contained a separate conclusion, for removing Clerk from the lands.

Clerk did not appear before the sheriff. He was held as confessed upon the sum libelled, due as arrears of rent ; for which a decret was pronounced and extracted ; and Innes afterwards insisted that Clerk should be ordained to find caution for the arrears, which amounted to more than one year’s rent, or be decerned to remove from the lands, in terms of the act of sederunt 1756.

The sheriff ordered Clerk to find caution between and a certain day ; which being elapsed, and no caution found, he decerned in the removing, to take place at Whitsunday 1779.

After this, decret was pronounced ; but, before Whitsunday 1779, Clerk paid up his arrears, and got a discharge ; but Innes having extracted the decret of removing, and set the lands to another tenant, ejected Clerk at Whitsunday 1779.

Clerk brought a reduction of the decret of removing, containing a conclusion for damages, on account of being ejected ; insisting, that, as he possessed, on a tack still current, and that the libel in the sheriff-court, concluding for removing, was laid neither upon the act of sederunt 1756, nor upon the tenant’s being in arrear of rent, the action was irregular, and no decret of removing could be pronounced upon it.

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The Lord Ordinary, before whom the action of reduction came, at first, assolizied Innes; but afterwards pronounced this interlocutor: ' 13th January 1780. In respect that the libel of removing before the inferior court was not laid upon the act of federunt, nor upon the tenant's being in arrear of rent, and that the whole proceedings before the inferior court were in absence, and that the pursuer was in possession in virtue of a tack still current, alters the former interlocutor, reduces the decret of removing, finds that the pursuer is entitled to enter again to the possession, and remain therein till the expiration of the tack; and ordains parties to be ready to debate against next calling, upon the other conclusions of the libel.'

A petition for Innes, against this interlocutor, being advised, with answers, 22d December 1780, ' The Lords adhered to the interlocutor of the Lord Ordinary reclaimed against, and refused the desire of the petition.'

A&A. *Francis Ruffel.*

Alt. *Lord Maitland.*

Clerk, *Menzies.*

No. XII.

December 22. 1780.

*JAMES FOGGO, and others, Executors of JOHN FOGGO,
Writer in Glasgow,*

Against

*JOHN M'ADAM of Craigengillan, and others, Creditors of
JOHN ALSTON.*

Writer's hypothec.—Triennial prescription.

IN a process of ranking and sale of the bankrupt estate of John Alston, the title-deeds of said estate were produced by the executors of John Foggo writer in Glasgow, under condition that producing these papers should not hurt any claim of preference, or right of hypothec, Mr Foggo's executors had, for payment of an accompt for business done by Mr Foggo for Alston.

After the process of ranking and sale was concluded, the papers were delivered back to Mr Foggo's executors, who, in the divisions of the price, claimed payment of the accompt due to Mr Foggo.

Objected by the other creditors: The accompt on which Mr Foggo's executors found their claim begins in 1774, and the last article stated is in 1762. John Alston died in 1768; and it is to be presumed this accompt was settled before his death. It is cut off by the
triennial

triennial prescription. For, however reasonable it may be, that a writer should have a hypothec on his client's papers, for an accompt of business, this right cannot be understood as giving a privilege, *præter communes juris regulas*, so as to keep up such a claim against the client and his representatives for ever; and so it was determined, Earl of Aberdeen *contra* Thomson, 26th November 1709, Forbes.

Answered for the executors: Although they consented to produce the papers, rather than interrupt the sale, they did so, under condition, that it should not hurt their right of hypothec; and, after the decret of ranking was extracted, the papers were given back, and are now in their possession; so they are not to be considered as claimants bringing an action for payment of an accompt, to which the triennial prescription may be objected. They are in the case of a person having a pledge, and are entitled, in virtue of the right of hypothec, to retain the papers till payment of the accompt; as was decided, Mitchel *contra* M'Adam, 18th January 1712, Forbes, and has ever since been held to be law.

The Lords found, ' That a writer's holding possession of his client's
' papers does not stop nor interrupt the triennial prescription of
' his accompt; and remit to the Ordinary to proceed accord-
' ingly.'

A&. J. Boswell.

Alt. G. Ferguson.

Clerk, Tait.

No. XIII.

December 23. 1780.

Messrs CUNNINGHAM, DOUGAL, and Company,

Against

WILLIAM MARSHALL.

Ranking and Sale.

MESSRS CUNNINGHAM, Dougal, and Company, being creditors to Mr Marshall, by an heritable bond and infeftment, brought a process of ranking and sale against Mr Marshall, which coming to be called before the Lord Ordinary in the outer-house, the pursuers craved the common interlocutor, allowing a proof of the libel, &c.

Objected

Objected for Mr Marshall: A ranking and sale is a process of a most serious nature, and of all others the most important to the defender. The direct tendency of the action is to strip him of his whole fortune, and declare him to all the world a notorious bankrupt: And this must be the consequence of pronouncing the interlocutor insisted for by the pursuers, by which a publication of the defender's bankruptcy must be made in the news-papers, and diligence granted for recovering the title-deeds of his estates. By the act 1681, cap. 17. no such action can proceed, unless the debtor's affairs be manifestly desperate, his estate affected by diligence, and the creditors in the actual possession of the same. But in this case there is no bankruptcy, no diligence against the estate by adjudication, nor is any creditor in possession, and, therefore, no action of ranking and sale can proceed; as appears from the style of the summons, which in this, and every such action, libels, that the creditors are in possession of the estate.

Answered for the pursuers: The summons proceeds on an heritable bond and infestment, as the pursuer's title; and subsumes, in the common style, that the defender is bankrupt, and some of the creditors in possession; and concludes, that the creditors should be ranked, and the estate sold. In practice, it is understood, that, when such an action is first called in the outer-house, the powers of the Lord Ordinary are limited, and he can only judge, 1st, of the pursuer's title; 2^{dly}, of the relevancy of the libel; and, 3^{dly}, if the debtor and his creditors are properly brought into court. All other points, such as the bankruptcy, the creditors being in possession, the rental, value, and holding of the lands; are reserved for the cognizance of the court. The Lord Ordinary is not entitled to enquire into these particulars. This was said to be agreeable to practice, and to the act of parliament 1681.

The Lord Ordinary had repelled the objections, and appointed the action of sale to proceed in common form.

Mr Marshall gave in a petition to the court, and this interlocutor was pronounced:

- ' The Lords having advised this petition, with the answers thereto,
- ' refuse the desire of the petition, and remit to the Lord Ordinary immediately to call the cause, and pronounce the act in
- ' common form.'

For pursuers, *William Craig, Ro. Blair.*

Alt. Ilay Campbell, Ro. Cullen.

No. XIV.

January 17. 1781.

Sir JOHN SCOTT of Ancrum, Baronet, and PATRICK
KERR of Abbotrule, Esq;

Against

Sir GILBERT ELLIOT of Minto, Baronet.

Member of Parliament.

SIR GILBERT ELLIOT, as heir apparent to his father, was enrolled a freeholder in the county of Roxburgh, in 1777, and was then chosen member in his father's place. He at that time stood upon his whole estate, the valuation whereof was above L. 4000 Scots. In expectation, however, of a contest at last general election, when he was again a candidate, he created nine qualifications in the usual way, and presented a claim for having his own qualification restricted to one of the nine which he had reserved, when he granted a liferent of the rest. Objections being stated and over-ruled at the meeting of freeholders, which happened both to be the Michaelmas head-court and the election day, they were brought before the Court of Session by a summary complaint.

As Sir Gilbert had still the fee of the whole estate, it was undeniable that he might continue upon the roll in that right, whatever became of his limited qualification, though he could not vote but in absence of the liferenters. From the terms, however, of his claim of restriction, it was strenuously argued, that he had in fact done what he could never rationally mean to do, viz. put it beyond his power to continue on the roll as a fiar, in case the qualification, of which he had also the liferent, should be set aside. Besides this argument, which seemed to be merely an ingenious criticism upon words, the three following objections were urged against the limited qualification.

In the *first* place, the decret of division pronounced by the commissioners of supply was null and void; for they had thrown together two separate *cumulo* valuations, and then made their division of the joint *cumulo*; whereas they ought to have taken the separate *cumulos* as they stood, and made a separate division upon each. The separate *cumulos* were Minto and Craigend; and, as evidence of their being separate, there was produced an extract from the Exchequer, of the original valuation-roll of the county, made up in 1680, by the commissioners, who had powers granted for that purpose by the act of convention 1667. Besides, in Sir Gilbert's own claim for enrollment in 1777,

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Craigend

Craigend is set forth as separately valued at L. 660. The commissioners had, therefore, in fact, taken upon them to make a re-valuation, which was certainly beyond their powers; and what made the matter worse was, that, by this mode of procedure, they had lessened the original valuation of Craigend, by at least L. 238, and increased proportionally that of Minto, upon part of which the qualification was reserved.

In the *second* place, Sir Gilbert, since the decret of division, supposing it to be effectual, had disposed a part of his own retained qualification, without having a second division; so that he stood enrolled upon part of an undivided *cumulo*, which could never be a legal qualification. By the account given in his own claim, the whole retained qualification was over lands, the real value of which was L. 157 Sterling, of which no less than the worth of L. 44 Sterling had been disposed; and, though it was alledged that sufficient evidence was laid before the freeholders, to convince them, that, after making an allowance for the valuation of the part disposed, there still remained above L. 400 of valuation; yet this was supposing a power in the freeholders, which is only vested in the commissioners of supply; and if, in the smallest instance, the freeholders might, by a calculation of arithmetic, proportion the valued rent to the real rent, why not in every instance, and so supersede the work of the commissioners altogether.

In the *last* place, the feu-duties of the lands retained by Sir Gilbert Elliot, are not separate from the feu-duties of those disposed away: So that he has neither a distinct property nor possession of the subject of his qualification; both which are requisite by law, and without which, it is impossible safely to take the oath of possession required by act 7mo, Geo. II. c. 16.

To the *first objection* it was answered: That the decret of division proceeded upon the oldest valuation-roll in the county which was extant, or any way authentic, viz. one regularly subscribed by five commissioners in 1707, and afterwards confirmed by one in 1742. As to the roll, of which a copy is in the Exchequer, it is not so much as known in the county; nor does there appear the least evidence that it was really a re-valuation, as is supposed, in consequence of the act of convention 1667. If the oldest rolls were to be most regarded, there is a copy of one in 1643, which was probably the original from which the roll 1680 was taken; and from this one part of the objection is removed concerning the valuation of Craigend; for in it the article of L. 660 includes both Craigend and Deanfoot, and, in the last division, these two together make L. 855: So that Minto, instead of having too great a valuation, has too little, according to these old rolls. The case of Mr Elphinston of Glack, in 1767, was quoted, to show that the ordinary valuation-roll, standing upon the land-tax books, was the proper rule in all sub-divisions, where no older or more correct roll was known at the time, though perhaps such a roll really existed. In that case, the Court of Session found otherwise; but their judgment was reversed by the House of Lords. With respect to the argument founded on Sir Gilbert's claim in 1777, that claim itself was erroneous.

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It was drawn by the man of business in Edinburgh, who, not knowing the valuation of the lands, naturally went to the Exchequer, and was misled by the copy of the roll 1680.

To the *second objection*, it was *answered*: That, before the meeting of freeholders, the whole disposed lands, excepting a very small parcel, amounting to L. 4 were re-disposed, without any investment having been executed in favour of the disponee. But, further, supposing the matter to be as it was before the re-disposition, yet the valuation of each parcel disposed or retained was fully ascertained from the very face of the commissioner's decret of division. For that decret does not only mention the sum of the lot, with the correspondent valuation, thus, Lot 1st, real rent L. 157, valued rent L. 572 : 1 : 4, but it previously states the real rent of each article, whereof the lot is composed : Thus, Lamblairs and Plantations, real rent, L. 4. ; Cowpark, L. 12 ; Kipp's-park and enclosure, L. 28, &c. ; so that, though the valued rent is only apportioned to the whole lot, yet that is not properly a *cumulo*, but only the different valuations of each particular summed up together ; and *inest* in the nature and terms of the operation, that each particular, having a certain sum of real rent, must have a respective sum of valued rent. The freeholders cannot, indeed, divide valuations, but they have eyes to read, and sense to understand, a decree of division when produced ; and it would have been quite ridiculous to call a meeting of commissioners to perform an operation in the Rule of Three, when this could be done by any person acquainted with the Rudiments of Arithmetic, from *data* in the decret itself. The case of Sir George Suttie in 1768 was similar to the present. He had sold ninety-eight acres of his estate without getting his valuation disjoined ; and the same objection, as in this case, was started on his election day. The answer made and sustained was, that his *cumulo* amounted to L. 1761 : 11 : 2 Scots, so that the freeholders could not but be convinced that such a small alienation would still leave more than L. 400.

To the *third objection*, *answered* : That it proceeds entirely on a mistake : For it supposes Sir Gilbert to have merely a superiority qualification, whereas he hath both the *dominium utile* and *dominium directum* of his reserved qualification, and he neither pays nor receives feu-duty for any part of it.

' The Lords, having advised the petition, answers, replies, and duplicates, repelled the objections, and dismissed the complaint.'

A&A. D. Rae, & H. Erskine.

Alt. Ilay Campbell.

D.

No.

No. XV.

January 17. 1781.

Sir JOHN SCOTT of Ancrum, Baronet, and PATRICK
KERR of Abbotrule, Esq;

Against

Sir JOHN DALRYMPLE of Cowsland, Baronet.

Member of Parliament.

SIR JOHN DALRYMPLE claimed to be enrolled at the time mentioned in the foregoing case; and, as his qualification stood upon part of the same lands with Sir Gilbert Elliot's, the same objection was stated upon the decret of division, and reference was made to the arguments pleaded for and against Sir Gilbert Elliot. But the three following objections were also stated.

In the *first* place, there is a nullity in Sir John Dalrymple's feizin. It bears to have proceeded upon the precept contained in the charter from the crown in favour of Sir Gilbert Elliot; and, although it mentions that a disposition and assignation was granted by Sir Gilbert Elliot, in Sir John Dalrymple's favour, which might, if properly used, have authorised infesting Sir John under the crown-charter; yet the instrument of feizin does not mention that this disposition and assignation was received by the bailie from the attorney, or that it was delivered to the notary, and, by him, or any other person, openly read and published to the witnesses; or that, after such publication, feizin was given to Sir John, in virtue of the assignation. The feizin, therefore, was given, not only contrary to the uniform practice in all such cases, but contrary to the clearest principles of law and common sense; for it was, in fact, the same as a feizin without any warrant whatever. In order to shew the practice, and make the imperfection of the present feizin appear more evident, a copy was subjoined to the petition, with the omissions printed in Italics.

In the *second* place, the lands of Kaimside-park and Kaimsmure-park, fall under the lot of Sir John Dalrymple's qualification, but are neither in his disposition nor feizin.

And, *lastly*, The writer of the disposition, by Sir Gilbert Elliot to Sir John Dalrymple, is not designed, and, consequently, the disposition itself is absolutely null and void, by the acts 1593, c. 175. and 1681, c. 5. The writer is called John Scott, clerk to the signet; but there is no such person in existence; so that, if the writer's name be truly John Scott, yet surely his designation is false, which comes to the same thing as no designation at all.

In

In *answer* to the *first objection*, it was *observed*: that there was a distinction made by our lawyers, between the formalities of a feizin and its essentials; but that the publishing and explaining the assignation of a precept was never said to be even a formality, and much less an essential solemnity of the feizin. It may have been introduced into some practice, *ob majorem cautelam*; but was never necessary; and, so far is the practice from being uniform, as set forth by the complainers, that, in the very book which is put into the hand of every notary, as his guide, called, *The Art and Office of a Notary Public*, there is no more required than what was done in this case, viz. producing and exhibiting the assignation, without a syllable of reading it over, publishing, or explaining. The form in the Supplement of Spottiswood's Styles differs a little from that now mentioned, but still more from the complainer's form, particularly, in so far as concerns this objection. The rule laid down in act 1693, c. 35. respecting the feizin of an heir or assignee, is clearly to the same purpose.

The *second objection* arises from a mistake in point of fact; for Kaimfide and Kaimsmure are only parcels of Kaims-farm, which is all in Sir John's infeftment; and the reason why they got particular names, was in order to ascertain the rent of them by the oaths of the tenants, when the decree of disjunction was applied for. The farm of Kaims, all excepting these parcels, was in Sir Gilbert Elliot's own possession.

As to the *third objection*, it is confessed that there is here a trifling omission; for the writer, through the hurry of making out different dispositions, wherein he was designed, 'John Scott Clerk to Cornelius Elliot writer to the signet,' had, in this, omitted the words, 'To Cornelius Elliot writer.' But, though this might seem to fall under the letter of the law, yet it does not fall under the spirit of it. The acts 1593 and 1681 were meant to prevent frauds in testaments, and other deeds, which appeared after the granter's death, where the strictest precautions are necessary. But here both the writer and granter are at hand, to confirm the authenticity of the deed; and the court have allowed an omission of this kind to be supplied, in cases of much more importance. This was done, particularly, in the case of Duke of Douglas against the Creditors of Littlegill, January 1747. In that case, which was a ranking of creditors, an adjudication was produced, which proceeded on a docketed accompt in 1663. The writer of the docket was not designed; but the court allowed that want to be supplied by proof.

Replied on this *last objection*: That the acts are so far from being in any shape limited to testaments, that the very deeds expressly mentioned in them are *charters* and *contracts*. And, as to the case of the Duke of Douglas, the decision there went upon a relaxation of the act 1593, or a doubt of its meaning. This is evident from a decision collected by Fountainhall, Earl of Nithsdale *contra* Maxwell of Cowhill, where the Lords found that the practice had allowed condescending upon the writer, or his designation, till that was discharged by act 1681.

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Duplied:

Duplied: The freeholders could not judge of the validity or truth of any deed, which was, *ex facie*, complete, as in the present case; and, even suppose a regular process of reduction had been brought, the acknowledgment and homologation of the granter would have been an unanswerable defence.

‘ The Lords repelled the objections, and dismissed the complaint.’

A&A. H. Erskine.

Alt. R. Blair & R. Dundas.

D.

No. XVI.

January 18. 1781.

W E L S H,

Against

M ‘ V E A G H S.

Cautioner of a messenger only liable for his actings qua messenger.

JOHN SYME, messenger, was entrusted by Welsh with letters of horning and caption against one of his debtors. Instead of attaching the debtor’s effects by poinding, the messenger received them from the debtor himself, sold them, by public roup, to the extent of the debt, and applied the proceeds to his own use. He became insolvent; and Welsh the creditor pursued Mr M’Veaghs his cautioners, for the debt; who

Pleaded: In poindings, the office of a messenger is to appretiate the debtor’s goods, to offer them to the debtor, upon payment of the debt to the creditor or his attorney, and, upon the debtor’s not paying, to adjudge and deliver them to the creditor or his attorney. The creditor, or his agent, is, by the form of the diligence, supposed to be present to receive the money or the goods, and to take instruments thereon. Stair, b. 4. tit. 47. p. 32. 33.; Office of a messenger, p. 299. 315. And the messenger has neither the custody of the one nor of the other.

The defenders are cautioners for the messenger’s faithful and exact performance of the duty of a messenger. Beyond that they have no concern. Had the creditor, in this case, attended personally, or employed an agent in due form; as the money was recovered from the debtor, it would have been delivered to him. Instead of doing so, he has employed the messenger as his agent. If the messenger has betrayed that trust, the creditor has himself only to blame.

This

This defence is clearly established by the statute 1587, cap. 47. defining the nature of the obligation imposed on the cautioners of a messenger. No security is there directed to be taken against embezzlements; although this species of malversation would have formed its most important object, if falling within the compass of the office. It provides solely against the *improper* execution of diligence. In like manner, the bond of cautionry lodged in the Lyon Court takes the securities bound 'for the damage, interest, and expences, which the lieges shall sustain through the *negligence, fraudulent, or informal* execution of the messenger.'

Such being the nature of a messenger's duty, to which the obligation of his cautioner precisely corresponds, no practice of creditors entrusting messengers to levy money, can subject the cautioners beyond their bond. But the general custom is to send a writer along with the messenger, who acts as attorney for the creditors; so that the practice is likewise in favour of the defenders. It may be said that the messenger ought to have executed the caption; and the cautioners being confessedly liable for the messenger's *negligence*, will be subjected to the debt on that ground. The answer is, that the messenger, having recovered payment of the debt, could not execute the caption.

Answered for the creditors: The statute 1587 requires security to be found 'for the skaith, damage, and interest of parties grieved by the *falsehood, negligence, or informality* of the officer.' The bond of cautionry bears, 'that the officer shall leally, truly, and honestly, use and *exerce* the office of messengery.' So far as the messenger did not execute the diligence of law, by poinding and imprisonment, he has *neglected* his duty: So far as he recovered a debt, in *consequence* of the diligence, and embezzled it, he has not *honestly* exercised his office; and his cautioners are therefore liable.

The *verba solemnia* in the execution of poindings do indeed seem to imply the presence of the creditor or his attorney. But as this practice would be very inconvenient and expensive, it is scarcely ever followed. Accordingly, there is not a week in which messengers do not recover debts in consequence of ultimate diligence. If, by means of such subtle distinctions as the present, their cautioners could shake themselves loose from their obligation, the salutary regulation introduced by the statute 1587, for the security of creditors unacquainted with the character of the messengers they employ, would, in a great measure, be frustrated.

Neither is the trust conferred on the messenger, nor the risk to which his cautioners are subjected, greater in this case than in many others which fall within that department. Thus, if a messenger is employed in executing a caption, and allows the debtor to escape, or if he is directed to inhibit, and neglects it, Are not his cautioners bound to indemnify the party suffering?

'The Lords sustained the defences.'

Lord Ordinary, Stonefield. A&C. James Eoswell. Alt. Alexander Millar. Clerk, Campbell.

C.

No.

No. XVII.

January 19. 1781.

Captain C H A R L E S N A P I E R,

Against

R O B E R T and J O H N B R O W N I N G S.

Impress Officer,—may impress the master and mate of a smuggling vessel of any size.

THE ship Liberty, of Folkestone, of the burden of 160 tons, was furnished with letters of marque against the French and Americans, in September 1778.

In winter 1779, she was seized on the eastern coast of Scotland, by three cutters belonging to the revenue, as having been employed in a smuggling trade. The master and mate, Robert and John Brownings, with the rest of the crew, were, by Captain Napier, regulating the impress service at Leith, impressed, and carried on board a tender lying in the Frith of Forth.

A bill of suspension was presented for Robert and John Brownings, which was passed upon caution.

A general point of law was then argued, and decided, viz. Whether the exemption from being impressed, competent to masters and mates of trading vessels of 50 tons and upwards, extends to persons of that rank, when employed in smuggling.

Pleaded for the suspenders: Smuggling is only a *malum prohibitum*. The delinquency consists solely in transgressing a statutory prohibition; and no punishment, not expressly prescribed by the statute itself, can with justice be inflicted upon the offenders. There is no law declaring that the commanding officers of smuggling vessels may be seized by the impress officers. The instructions given by the Lords of the Admiralty, contain no directions to that effect; and it would be productive of the worst consequences, if it were in the power of a regulating Captain, upon this pretence, without proof, trial, or conviction, to adjudge whom he pleased to the sea-service.

Special statute has been thought necessary to authorise justices of peace to adjudge for soldiers, persons convicted of running goods; and the mode of trying this offence is pointed out by the act 19th George III. c. 50. By c. 69. of the same year, a form of trial is directed against persons guilty of obstructing the officers of the revenue, in seizing prohibited goods; and it is declared lawful for justices of peace to adjudge such persons, upon conviction, to the sea or land-service.

Courts

Courts of law refuse to sustain action upon smuggling contracts; because doing otherwise would be giving the aid of justice to compel performance of illegal obligations. But the suspenders make no such demand. They only insist, that their rank in life exempts them from being impressed; and, that their having been concerned in smuggling, is not to deprive them of this immunity, any more than if they had been guilty of adultery or perjury; crimes of a deeper dye than smuggling, but which were never made the handle of obliging the commit-tees to serve as common sailors on board the fleet.

There are few Captains in the service of the East-India Company, or even in the King's ships, who do not bring home articles for which the duties have not been paid; no gentleman returns from his travels without bringing sundry prohibited commodities along with him; but it was never heard that an impress officer could, on that account, adjudge them to the sea service.

Answered for the charger: There is no exemption from being impressed, competent in strict law, to *sea-faring* men of any denomination.

From a laudable attention to the interests of commerce, the Lords of the Admiralty generally instruct the lieutenants on the regulation to pass masters and mates of vessels of 50 tons and upwards. But they may withhold or suspend such instructions; and the charger's directions are, 'to impress as many sea-faring men, and others described in the 'press-warrants, as he possibly can, from privateers, as well as other 'ships or vessels'.

Supposing such exception to be established by inveterate usage, there is no law nor expediency in extending it to smugglers in any rank. A superior rank among them, is only a pre-eminence in defrauding the revenue and fair trader, and can never, in a court of law, be attended with beneficial consequences to its possessor.

The charger pretends to no judicial powers, nor to punish smugglers. He only contends, that smuggling can give no exemption, and that a sea-faring man, otherwise liable to be impressed, cannot be privileged, because he holds rank in a smuggling vessel.

The subject of the charger's department are *sea-men* and *sea-faring* men. Offenders against the revenue on land, and gentlemen returning from their travels fall not within that description. A Captain of a King's ship is already in the service: And, if the sole employment of an East-India Captain were to defraud the revenue, he would be equally subject to the impress regulation, with the meanest seaman.

The Lords 'repelled the reasons of suspension, and found the letters 'orderly proceeded: And to this judgment they adhered, upon advising a reclaiming petition and answers.

N. B. The Court were unanimously of opinion, that masters and mates in a ship of 50 tons, or upwards, employed in a lawful commerce, could not be impressed.

Reporter, Lord Kennet. Act. Ilay Campbell. Alt. Croftie, Elphinston. Clerk, Tait. C.
I No.

No. XVIII.

January 20. 1781.

*PARTNERS of the WOOLLEN MANUFACTORY
at Haddington,*

Against

*ELIZABETH GRAY.**Mutual contract.*

BY a contract of marriage entered into betwixt William Rose and Elizabeth Gray, in the year 1766, she assigned to him a bond for L. 500 Sterling, due to her by the Earl of Sutherland. On the other hand, he was obliged to have in readiness, by Whitfunday then next, the sum of L. 500 Sterling, to be laid out at the sight of certain persons, her friends, upon land, or personal security, and to take the rights in favour of himself and her, and longest liver of them two, for her life-rent-use: Likewise, as soon as the bond assigned in name of tocher was paid, to settle the farther sum of L. 500 Sterling, in the same manner. She was further entitled to the sum of L. 100, in lieu of her *jus relictæ*, if there existed children of the marriage, and to L. 200, if otherwise.

In the year 1770, Mr Rose failed in his circumstances. The partners of the woollen manufactory at Haddington, his creditors, used arrestments in the hands of the Countess of Sutherland, debtor in the bond assigned. In the forthcoming, Mrs Rose insisted for retention, till she should be secured in the provisions stipulated in the marriage-contract.

Pleaded for the creditors: The assignation by Mrs Rose is unqualified and absolute. She was thereby divested of all right in the bond, which, being transferred to her husband, was attachable by his creditors, according to the common rules of preference.

It is impossible for creditors to know whether the husband has fulfilled his engagements to the wife. It is probable the friends nominated in the marriage-contract would not allow so many years to elapse, without doing their duty, by seeing them performed.

But, supposing no implement, the wife's plea of retention is inadmissible in the present case. This faculty of retention implies something to be done or delivered by the party exerting it. Here there is no room for such exertion. The wife's case is the same with that of a feller of land, who, before receipt of the price, has granted a disposition, containing procuratory and precept; or of a husband, who, in consideration of the tocher promised by his wife, has infected her in security

curity of her jointure. Although the price or tocher, by reason of the insolvency of the debtors therein, should not be paid, the purchaser, or his creditors, are entitled to take infestment, and the wife to insist in her security. The feller and husband, by fulfilling their part of the contract, have betaken themselves to the personal obligation, and must make it effectual, in the best way they can.

The case of a minute of sale of lands is totally different. Feudal property cannot be transferred by voluntary alienation, without procuratories of resignation or precepts of feizin. A bargain concerning lands, without these formalities, is incomplete. Something remains to be done by the feller, which a court of law will not oblige himself to do, without implement by the other party.

This doctrine is supported by various decisions, Fountainhall, 22d November 1692, Sir John Hill *contra* Elizabeth Lorrimer; *Id.* 27th January 1698, Sir Thomas Kennedy *contra* Jane Lyal. When those seeming to favour a contrary doctrine are attended to, they will be found to apply to particular cases, in which, either the assignation was made with the express burden of the jointure, or the tocher, not antecedently in the disposal of the wife, remained in the hands of the person who became bound to pay it, or who was appointed trustee in the marriage-contract.

2do, The caution demanded by Mrs Rose, if any is at all exigible, is by much too extensive, subjecting the creditors to the whole provisions in the wife's favour, which may far exceed the sums affected by this competition. It is incontestible, that the annualrents, during the subsistence of the marriage, may be attached, without finding security. And, as the principal sum, if lying untouched in Lady Sutherland's hands, could only secure Mrs Rose, so far as L. 500 Sterling would go, the circumstance of her husband's creditors having attached that sum, ought not to enlarge her security.

Answered for Mrs Rose: In mutual contracts, one party cannot insist for implement, without fulfilling his part of the engagement. The tocher stipulated from the wife, and the provisions from the husband, are mutual causes of each other. The husband, therefore, or his creditors, who, by their diligence, substitute themselves precisely in his stead, cannot demand the tocher, until the provisions are secured to the wife.

These principles are supported by many authorities and decisions; Law Dictionary, *voce* Mutual Contract; Continuation of the Dictionary, *ibid.*; Faculty Collection, 12th January 1761, Monro; 27th January 1765, Corrie *contra* Philp; Erskine's Larger Institute, b. 3. tit. 3. p. 86. To elude these authorities, the creditors fall upon a singular argument. They are obliged to maintain, that a trustee, or third party, consenter to a marriage-contract, has a better and broader right than the party principally interested.

2do, The necessary consequence of sustaining the right of retention in this case is, that the creditors cannot attach this fund, without subjecting themselves to the whole obligations incumbent on the husband.

As

As he could not insist for the use of the tocher, and, at the same time, refuse giving security till the dissolution of the marriage, his creditors must be exposed to the same restriction.

The Lord Ordinary found, ' That, although the creditors could not ' evict the principal sum in Lady Sutherland's hands, without finding ' security to the wife for her *provisions*, in the event of her surviving ' the husband, yet they might attach the annualrents, as they fell due, ' without finding such security.'

The creditors *reclaimed* against this judgment, so far as it sustained the wife's demand. The Lords ordered a hearing on the general point: Whether a wife, assigning sums, by way of tocher, without restriction or limitation, could plead retention therein, in security of her provisions. And the unanimous opinion of the court seemed to be, that the wife, by the assignation, was completely divested, and, in a competition with her husband's creditors, could only rank according to her diligence. Here, however, on account of the circumstances of the case, they obliged the creditors attaching the principal sum to find caution for the wife's provisions, to the extent of the sums recovered.

The circumstances weighing with the judges, in the determination of this case, are distinctly set forth in the interlocutor.

' The Lords having advised this petition, with the answers thereto, ' and having heard parties procurators thereon in their own pre- ' fence; in respect that, in the marriage-contract between Mrs ' Rose and her husband, she did not rely upon his personal secu- ' rity, for implement of the provisions thereby stipulated in her ' favour; but he is taken expressly bound, that, as soon as he ' should recover payment of the tocher thereby assigned to him, ' he should secure the same, to the amount of L. 500 Sterling, in ' favour of himself and her, and longest liver of them two, for ' her life-rent-use: Therefore, and in respect that the tocher as- ' signed is still *in medio*, and that her husband is insolvent, the ' Lords find, That the same cannot be affected by the husband's ' creditors, until they find sufficient caution to her for payment of ' the provision, in terms of said contract, in the event of her sur- ' viving her husband, to the extent of the sums which they shall ' receive; and remit to the Lord Ordinary to proceed in the cause ' accordingly.'

Lord Ordinary, *Monboddo*.

Adv. *Ilay Campbell*.

Adv. *Crosbie & Hay*.

Clerk, *Orme*.

C.

No.

No. XIX.

January 23. 1781.

GENERAL FLETCHER,

Against

JAMES FERRIER.

Discrepancy in the descriptive and valent clauses in a retour. One retour cannot be set up against another.

AT a meeting of the freeholders in the shire of Dunbarton in 1780, General Fletcher claimed to be enrolled upon certain lands, part of the Dukedom of Lennox; and for proving their old extent, produced the retour of the special service of Charles Duke of Lennox, dated 25th April 1662.

The *valent* in this retour does not specify the separate values of the different tenements, but states the whole Dukedom to be L. 517:3:4 of old extent. To ascertain the *several* values, the claimant had recourse to the descriptive clause, where, to every tenement is prefixed a denomination by pounds, merks, and shillings, and the amount of the whole only falls short of the *cumulo valent* by L. 1:16:8. Upon this discrepancy, it was

Objected: * The *fifth* head of the brief of mortancestry is that alone in which the inquest is called upon to ascertain the old and new valuations; and their verdict on this head only is to be regarded in questions respecting freehold claims. The descriptions are the work of the conveyancer, intended merely to denote the different tenements in which the heir is desirous of being served, and originate in circumstances which cannot now be explained. For the most part they are taken, as these seem to have been, from the tax-rolls, which were made up by the sheriff-clerks of the different counties, not according to the old extent of Alexander III. referred to in the laws concerning elections, but from later valuations in 1366 and 1424, by which the public subsidies were paid in Scotland till 1667. See Kames's Law Tracts, *voce* Retours; Erskine's Larger Institute, tit. Rights of Superiority.

The court has been induced to sustain the evidence of retours, in which the *several* descriptive values, when joined, precisely agree with the *cumulo valent*; but, in the present case, they do not correspond; and, as this is a question, not of equity, but of positive law, where the

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court

* This objection was formerly over-ruled in a question respecting the same retour, quoted in the sequel; but, as it does not seem that the matter was then so fully treated, nor that any attempt was made to elide the presumptive evidence arising from the coincidence of the two clauses, by positive proof adduced from other retours, it has been thought proper to give a summary of the argument in this place.

court is not at liberty to make arbitrary distinctions, the smallness of the discrepancy cannot vary their judgment.

Some of the descriptions in this retour particularly mention the old extent, from which it may be inferred, that the other denominations are taken from another standard.

Further, the objector is now enabled, by evidence not before the court when this retour was formerly under challenge, Falconer, vol. 1. No. 48. to shew that the descriptions in this retour cannot refer to the old extent.

1mo, Many of the tenements composing the Dukedom of Lennox are contained in the retours of the estates of Lufs and Ardincaple, and in those of the family of Napier. They are there *expressly* retoured to sums different from, and less than, these in the present retour.

2do, The Old Earldom of Lennox, in the middle of the 15th century, devolved upon heirs portioners. One half went to the family of Darnly, to whom the Dukes of Lennox succeeded. The other half divided betwixt the ancestor of Mr Haldane of Gleneagles, and Elizabeth Monteith, married to Lord Napier. From an accurate investigation of the subjects contained in the retour founded on by the claimant, it appears, that they are all parts of the old Earldom, with the exception of four, whose extent is only L. 74. After that is deduced, the descriptive sums amount to L. 441 : 6 : 8. The old extent of the lands contained in Elizabeth Monteith's retour, in the fourth of the old Earldom, is only L. 125 ; of course, the descriptive sums in this retour are nearly twice as great as they ought to be, if they were meant to denote the old extent.

3tio, It appears from the titles produced for the claimant, that the family of Lennox were, at the period of this retour, possessed of twenty-four tenements not enumerated in the descriptive clause. These would be admitted to a share in the *cumulo* valent ; so that the sums annexed to the lands specially mentioned have been estimated by some other rule than the old extent.

Answered for General Fletcher : The statute 16th Geo. II. restricts the proof of old extent to retours, without limiting the consideration of the court to any particular clause in them. It is therefore sufficient, if, from the whole, satisfactory evidence can be collected of the old extent.

The universal practice in retours, is to describe the lands by the old extent. The near coincidence of the two clauses in this retour proves that to have been done in this case. Where the descriptive values *exceed* the *cumulo* valent, the discrepancy may be fatal to the credibility of the retour ; because there it cannot be determined what tenement is described beyond its real extent. The amount of the present objection is, that some of the lands may be entitled to a larger valuation than is given them in the descriptions.

There is no distinction in this part of our law betwixt the most ancient valuation, supposed to have taken place in the reign of Alexander III. and the later ones, by which the land-tax was paid, till after the Restoration. And the reason of the law, which is, that persons
subject

subject to a certain share of the public burdens, should likewise have a share in the legislation, militates against such a distinction.

When a freehold qualification is to be made out upon the old extent, all required by law is, that the same shall be ascertained by a retour preceding the 1681. And no objection can invalidate that evidence, which does not arise from the retours founded on by the claimant. A contrary practice would tend to unhinge the faith of all retours, and would be the source of endless disputes.

But, further, the retour of Elizabeth Monteith is in 1474; that of the Duke of Lennox in 1662. Many transactions might have taken place betwixt the co-heiresses and their successors. If necessary, the claimant is able to show that such actually existed.

The twenty-four tenements pointed out by the objector are parts of those which are particularly named. Although they were not; the legal presumption in such a case would be, that the inquest had them not under their consideration, otherwise the *cumulo* valent would have been increased.

‘ The court repelled the objection.’

Act. *Ilay Campbell.*

Alt. *Wight, and H. Erskine.*

C.

No. XX.

January. 23. 1781.

ANDREW HOUSTON,

Against

JAMES FERRIER.

Member of Parliament.—Court of freeholders cannot reject a claimant, because his author's right is fettered by a strict entail, although the fetters appear from the titles produced.

AT a meeting of the freeholders in the county of Dunbarton, in 1780, Mr Houston claimed to be enrolled upon certain lands, part of the barony of Cumbernauld. For instructing his qualification, he produced, *inter alia*, the charter of Lady Elphinstone, proprietrix of that barony; and a disposition from her, in his favour, containing an assignation to the charter and precept of seizin inserted in it,

it, so far as respected the particular lands upon which his claim was founded.

As Lady Elphinstone's charter, however, contains strict prohibitory, irritant, and resolute clauses ; to this claim it was

Objected by Mr Ferrier : The rights produced are of a precarious and *resolvable* nature, the charter bearing *in gremio*, that the claimant's author shall not grant such rights, and, if she attempt it, that the grants shall be, *ipso facto*, void and null.

In deciding the merits of this objection, the freeholders do not go beyond their proper sphere, by judging of a progress of titles, or of the rights of third parties. *Ex facie* of the titles produced, they only convey a limited or qualified right, subject to a power of defeasance, competent, by the tailzie engrossed in the charter, to every heir of entail. On this account, this case differs from that of Campbell of Shawfield against Mure of Caldwell, 5th February 1760, where the entail did not appear from the production made by the claimant.

It is against the principles of the constitution, that rights entirely pendent on the will of third parties, should give a right of representation in parliament.

The statute 1681, in affirmance of these principles, renders all redeemable or *defeasible* estates in effectual to create a qualification. The exception of wadsetters, and others, particularly mentioned in the act, confirms the rule as to other rights ; and the statutes of Queen Anne, of 7th and 16th Geo. II. were enacted to reform the abuses which had crept into this part of our law by the devices of persons desirous of having more than their due share of the legislation.

It has been found, in numberless instances, that dispositions, reserving powers of burdening or revocation, do not establish a freehold claim. It can make no distinction, whether these powers are in favour of the granter, or of a third party ; whether they are to operate upon payment of a sum of money, or without any such consideration ; whether they are expressly stipulated, or arise from the nature of the transaction itself. This may be clearly collected from the terms of the oath imposed on electors by 7th Geo. II. The party called upon must swear, ' That he has come under no obligation, directly, or *indirectly*, for re-disposing or re-conveying the lands, *in any manner whatsoever* ; or making the rents or profits effectual, to the use or benefit of the person from whom he has acquired the estate, or any other person *whatsoever*.'

If a person were to burden a disposition with a clause, declaring, That, as he stood bound to convey the lands to a third party, it should be therefore lawful to the disponent's eldest son to redeem, upon payment of an elusory sum, or to set aside the right so granted ; such conveyance surely could not give a right to vote. Yet the present case is, in substance, precisely similar ; the only difference being, that the stipulation occurs in a tailzie, and is implied, instead of being expressed.

Answered for Mr Houston : To found the present objection, it is necessary to shew, 1^{mo}, That the qualities and limitations affecting the claimant's

claimant's right are intrinsic, and such as the freeholders can competently discuss; and, 2^{do}, That they deprive him of a freehold qualification.

The author's charter, indeed, contains a very strict entail; but the precept of seizin, which is assigned to the claimant, is fettered by no limitation, and he is not concerned with any other part of the charter.

Nor do the irritancies contained in the charter, afford *complete evidence* of the *defeasibility* of the claimant's right. To render an entail effectual against singular successors, it must be inserted not in one charter, but in all the investitures. It must likewise be recorded in terms of the statute. The decision, Campbell against Mure, is precisely in point. Indeed, it would be highly absurd, that country gentlemen should be either obliged, or entitled, to determine the validity of entails, and their effects as to singular successors.

Neither is a defeasible right, on that account, exceptionable, as the foundation of a freehold claim. The statute 1681 only respects rights which are subject to redemption, either of their own nature, or by the stipulation of parties; and the act of Queen Anne only extends the prohibition to 'dispositions redeemable for payment of sums of money.'

There are many rights subject to personal challenge, or defeasance, at the instance of third parties, which are nevertheless absolute in their nature, which were never intended to be the subject of discussion before freeholders, and which have been held to establish an indisputable right to a qualification. For instance, a disposition to lands, granted on death-bed, is subject to reduction *ex capite lecti*; and a gratuitous conveyance, by a person insolvent, is subject to challenge at the suit of creditors: But, was it ever heard that these faculties, competent to heirs and creditors, were assumed by a court of freeholders, as reasons for keeping from the roll the party favoured by these conveyances? In the same manner, a deed of entail founds a *jus crediti* in the substitutes, in consequence of which, they may set aside alienations in contravention of the entail: Yet these alienations are good against every person, till reduced by the heir of entail, and may be secured even against him by the positive prescription.

'The Lords repelled the objection.'

For Mr Houston, *Lord Advocate, Neil Ferguson.*

Alt. Ilay Campbell.

L

No.

No. XXI.

January 23. 1781.

JAMES FERRIER,

Against

The Honourable HENRY ERSKINE.

Member of parliament.—No possession can be attained, in terms of the laws of election, of a superiority of a part of a tenement holding blanch.

THE barony of Drumry, in the county of Dumbarton, is held blanch by the Earl of Crawford, of Lord Graham, eldest son of the Duke of Montrose, for payment of eight pennies Scots, or a pair of spurs.

The superiority of the forty shilling land of Cloverhill, part of that barony, was conveyed by Lord Graham to Mr Erskine, with an assignation to the rents and casualties, and with powers to Mr Erskine to enter and receive vassals, &c. Upon these lands Mr Erskine was enrolled as a freeholder in the county of Dumbarton.

In a complaint against this enrolment, in the name of Mr Ferrier, it was *maintained*, That the blanch duties, payable by Lord Crawford the vassal, for the whole barony, were not divided; and that Mr Erskine, therefore, had not a separate possession of the lands upon which he was enrolled.

Answered for Mr Erskine: In blanch holdings, the duty, payable by the vassal, is merely an acknowledgment. As this acknowledgment is incapable of division, when a partition of the superiority takes place, the vassal must perform it to each superior. The vassal may object to the multiplication of superiors; but it is *jus tertii* to the freeholders.

Observed on the bench: The superiority of a tenement holding blanch cannot be divided. A blast of a horn, a rose, a pair of spurs, cannot be delivered in parts. When a part of a superiority of this nature is disposed, no possession can be attained on it. A qualification founded thereon is purely nominal and fictitious; and Mr Erskine's enrolment, on this account, was unwarrantable.

'The Lords found, that the freeholders did wrong in admitting Mr Erskine to the roll,' &c.

For Mr Erskine, David Graeme.

Alt. Craig.

C.

No.

No. XXII.

January 23. 1781.

ILAY CAMPBELL,

Against

MALCOLM FLEMING.

Member of parliament.—No alteration of circumstances when the renewal of the freeholder's investiture does not proceed upon his resignation.

IN the year 1773, Mr Fleming was admitted to the roll of freeholders in the county of Dumbarton, as liferenter of sundry lands, part of the estate of Cumbernauld. In October 1779, Lady Elphinstone, proprietrix of that estate, for the purpose of creating a qualification on the fee of these lands, granted a new disposition to Mr Fleming, in life-rent, and to another person in fee.

Upon this disposition, which was immediately followed with infeftment, the fiar lodged a claim, to be enrolled at the Michaelmas head court 1780; and, in this claim, Mr Fleming concurred, stating his newly acquired titles, and concluding either to be continued in his former place on the roll, or to be enrolled of new.

The meeting for electing a member for the county having taken place on the 14th September 1780, it was *objected* to Mr Fleming's remaining on the roll, that, by his acceptance of a new right, and claiming to be enrolled thereon, he had virtually renounced that upon which he was admitted to the roll.

To this objection it was held by the court to be a sufficient answer, that, as the new infeftment did not proceed upon Mr Fleming's resignation, the old one still subsisted in his person. They, therefore,

‘ Repelled the objection.’

Objector, *Ilay Campbell.*

Alt. Ro. *Dundas.*

C.

No.

No. XXIII.

January 31. 1781.

JAMES HUNTER-BLAIR, and others,

Against

*ROBERT PHINN.**Borough-royal.—Non-residence of Burgeſſes.*

IN September 1780, Phinn was, by the incorporation of waulkers of Edinburgh, elected their deacon. Against this election, Mr Hunter-Blair, and other members of the town-council, in a complaint preferred to the court,

Objected: Mr Phinn, whose occupation mostly consists in the scouring of blankets, resides not in Edinburgh, nor within its liberties, but in the village of Collington, about three miles distant from the city. It is implied in the constitution of all royal boroughs, that the privileges belonging to burgesſes, and members of incorporations, can be enjoyed by those only, whose residence within their district subjects them to a share of the corresponding duties and taxations. This rule of common sense and justice, is established by several statutes, and by many acts of the Convention of Royal Boroughs: And, with respect to Edinburgh in particular, it is likewise founded on enactments of the town-council; and on decisions of the supreme court, especially that in the case of Millar and Nicolson 1763, in which it was found, that Millar, by his residing only a few yards beyond the walls of the city, was disqualified for being elected a deacon of the corporation to which he belonged.

Answered for Phinn: As the vicinity of a stream of water is necessary for the exercise of his trade, his residence must be chiefly in the country. If, however, this circumstance were sufficient to create such a disqualification, the consequence would be, to deprive all persons of the same profession, of their right of becoming members of the Town-council; a right, which they derive from the sett of the borough, which has ever been acknowledged, and which is nowise inconsistent with justice. For he does not consider himself as exempted from any burden to which the other burgesſes are liable, nor in particular from the payment of ſtent, agreeably to the decision of the court in January 1677, Dirleton.

The usage of the borough has given to non-residence no such effect as is alledged by the objector: And to its uniform tenor the respondent appeals; though, in fact, he is not properly non-resident, having

having a kind of ware-room in town for the use of his trade. Nor, at any rate, is the single decision in the case of Millar to be held as conclusive against him; especially as Millar's non-residence could not be justified by the nature of his occupation, which was that of a glazier.

Observed on the bench: The corporation has in this election proceeded upon a *bona fides* founded in the usage which had prevailed in similar cases. Though, therefore, the election had not, in itself, been well founded, it could only have been overturned by means of a formal declarator.

The circumstance of the ware-room, being trifling, or ambiguous, seemed to have no influence on the court.

The Lords *dismissed* the complaint.

A^c. Maclaurin, Arnot.

Alt. R. Sinclair, Hay.

Clerk, Tail.

S.

No. XXIV.

January 31. 1781.

PETER WHITE, and others,

Against

ALEXANDER CHRISTIE.

Privileged debt.—Wages due to Artizans.

CHRISTIE having been appointed factor on the sequestrated estate of James Small, a bankrupt tenant, but who likewise exercised the trade of a wright, and employed servants in both these capacities; applied to the court by petition, praying them to authorise a division of the funds among the several creditors; particularly, the landlord, the farm-servants, and the *mechanical* servants.

It had been found, by a decision which the court ordered to be inserted in the books of federunt, 23d January 1779, 'That the wages due to such servants of a bankrupt tenant as are kept for the purposes of the farm, are privileged debts on the price of the bankrupt's effects, and are preferable to arresters.' And the factor desired to be certified, whether this bankrupt's *mechanical* servants were not entitled to a similar preference upon the materials of his handicraft.

The Lord Ordinary on the bills, to whom this application was remitted, 'Found, that, on the proceeds of the stocking, the landlord was preferable, *primo loco*, the labouring servants preferable, *secundo loco*,

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‘ *loco*, to the extent of half a year’s wages ; but *that the servants, the artizans, were only to be ranked as common creditors.*’

A petition reclaiming against this judgment, was refused by the court without answers.

Lord Ordinary, *Hailer.*

A^d. *Macleod.*

S.

No. XXV.

January 31. 1781.

D U K E of M O N T R O S E, and others,

Against

Sir J A M E S C O L Q U H O U N.

Multiplication of Superiors.

SIR JAMES COLQUHOUN is proprietor of certain estates in Dumbartonshire, which he holds of the Duke of Montrose as superior ; who having, with the design of creating freehold qualifications, parcelled out the superiorities of these lands among fourteen different persons, by granting to them liferent-rights, Sir James instituted against him and his disponees, a reduction of these rights, as being productive of an undue multiplication of superiors.

Pleaded for the defenders : imo, ‘ Alienatio superioritatis permittitur dominis, dummodo vassalli conditio in ea non sit deterior.’ This rule is delivered by Sir Thomas Craig, (*lib. 2. L. 11. § 35.*) and results from the first principles of law relative to property in general. If then, no real damage arises to the pursuer from the present alienations, they ought to receive the sanction of the court.

Those parts of the feudal law, which are now obsolete or abrogated, being overlooked, it is evident, that the connection of superior and vassal, imports only, on the part of the superior, an obligation to enter the heirs or singular successors of his vassal ; and, on the part of the latter, that of acknowledging the former, by taking the *holding* from him, and paying the casualties of entry and relief, together with the ordinary annual prestations. In none of these respects does the condition of the pursuer become worse, in consequence of the present multiplication of superiors, by liferent infeftments, which are all liferents
by

by constitution. For, as to the casualties, it appears, from the authorities of our lawyers, as if liferenters of this sort had not even the power of entering heirs; but it is clear, that the existence of a liferent, though by reservation, does not bar the fiar from the exercise of his right of superiority; and consequently leaves to the vassal an option of resorting to him for an entry; Craig, l. 2. d. 12. § 16. Ib. d. 17. § 42; Erskine, b. 2. l. 9. § 42. Since then such an option is reserved to the pursuer, his condition, in this respect, is nowise altered for the worse. And, with respect to the annual prestations, these wholly consist in blanch duties of an elusory nature; and no effect of real moment can be produced in them by any multiplication of superiors.

Answered: It is a doctrine of the feudal law established in ours, ‘*Ut vassallus pro uno feudo plures dominos habere non compellatur.*’ Con-
fuet. feud. Stat. Rob. III. Clerk Home, 9th June 1740, Sir John Anstruther against Alexander Macmillan. Hence a superior cannot convey his right of superiority, so as to interpose another person between him and his vassal. And hence that right is considered as a *jus individuum*, which of course falls to one only of several heirs-portioners.

The defenders have denied the wisdom or expediency of this principle, in relation to the present case; but their reasoning is erroneous. The power of entering vassals is the characteristic of the right of superiority. Accordingly, though the infestment of a person, interposed between the superior and vassal, is, *quoad* the right of superiority, void and null; yet this infestment will carry in favour of the grantee, as a donatary and assignee, all the *duties* and *casualties* of superiority; and the only criterion of its nullity is, that it confers not the power of entering vassals; Lord Stair, b. 2. l. 4. § 5. Douglas of Kilhead, against vassals, 30th January 1671. Every right of superiority, therefore, whether in liferent or in fee, necessarily comprehending the privilege of entering vassals, it is plain, that in this, as well as in other respects, the right of the liferenter, while it subsists, is exclusive of that of the fiar; which, meanwhile, remains dormant or suspended; Stair, b. 2. l. 6. § 8. And hence has arisen the general practice, that liferenters concur with fiars in granting charters or precepts of *clare constat*. Thus, it is evident, that the multiplication of superiors, which the liferent-conveyances in question were designed to create, would be attended with every effect belonging to the right of superiority; and, of course, would subject the pursuer to the obvious inconveniencies which must result from a vassal's subordination to *thirteen* additional superiors.

The court ‘sustained the reasons of reduction.’

In a reclaiming petition against this judgment, the defenders endeavoured to found an exception from the general rule thereby adopted, upon this alledged speciality, that several of the subjects in question, though, by the indulgence of the superior, they have been contained in one charter, were, however, different tenements, and held for different prestations. But the court refused this petition, without answers.

Lord Ordinary, Gardenston. Act. Baillie. Alt. Lord Advocate, H. Erskine. Clerk, Robertson.

S.

No.

No. XXVI.

February 1. 1781.

Sir JOHN PATERSON,

Against

JOHN ORD.

Member of parliament.—Courtesy.—Right to be enrolled as a freeholder.

TO Mr Ord's claim of being enrolled as a freeholder of the county of Berwick, various objections, of little moment, were offered, which became the subject of a petition and complaint to the court.—When, however, they were thus under consideration, a new *objection* was raised, on this ground: That the claimant's wife had succeeded to the lands in question, not as an heiress, but by singular titles. The court having ordered memorials on the point, it was

Insisted by Sir John Paterson the objector: That, in these circumstances, the courtesy did not belong to the claimant, as appeared from a numerous train of authorities, and, consequently, that he had no title to be enrolled. The authorities referred to are, Skene, De Verb. Signif. voce Curialitas; Craig, Lib. 2. D. 22. § 42.; Stair, B. 2. c. 6. § 19.; Bankton, B. 2. c. 6. § 19.; Erskine, B. 2. c. 9. § 54.; Home, 11th January 1740, Hodge *contra* Fraser.

Answered: *imo*, In the most antient treatises on the law of Scotland, the husband's right of courtesy is laid down, independent of any distinction arising from the wife's having acquired her estate by succession, or by singular titles; Reg. Majest. Lib. 2. cap. 22.; and Leg. Burg. cap. 44. As this distinction, therefore, did not antiently obtain in our law, so, whether we consider the origin or the design of the courtesy, there appears no rational ground for its subsequent introduction. The authority of Craig, when properly understood, is adverse to the distinction. In Lib. 2. dieg. 22. § 41. he states the comparison between the courtesy and terce, in such a manner, as clearly shows he was a stranger to that idea. His words are these: 'Quod ad quantitatem attinet, (Curialitas) a Triente differt, quod Triens sit tantum *tertia pars* usufructus totius: At Curialitas sive Curtesia est, *totius patri-monii quod ad uxorem pertinebat, dum moreretur. In reliquis eadem lege et paritate terminantur.*' Lord Stair, indeed, has interpreted this author's meaning in a different manner; an interpretation which has been copied after by succeeding writers; and, in the same train, the deci-

sion

sion quoted seems likewise to have followed. Thus the weight of these authorities appear to be moved.

Accordingly, in the statutes regulating the election of members of parliament, particularly the acts 1681, and 12th of Queen Anne, in both which mention is made of husbands' rights of voting, *by virtue of their wives infestments*, no such distinction is recognized by the legislature; nay, it is plainly excluded. But,

2do, The last of these statutes seems to confer on husbands the right of voting, in virtue of their wives' infestments merely, without any respect to their own patrimonial interest, and independent of the *ius mariti*, or of the courtesy.

'The court sustained the objection.'

Act. Swinton and Ilay Campbell.

Alt. Lord Advocate and H. Erskine.

Clerk Menzies.

S.

No. XXVII.

February 2. 1781.

Dr J O S H U A M' K E N Z I E,

Against

L E G A T E E S of Mrs E L I Z A B E T H H O L T E.

Presumed Will.

MRS ELIZABETH HOLTE, by her last settlement, conveyed to Dr M'Kenzie her whole funds, in trust, for behoof of his children; 'but, in case of the death of James M'Kenzie, (one of them), she appointed the sum of L. 700 to be paid and divided by her said trustee, equally, among the children of Janet M'Kenzie, *and* the children of Anne M'Kenzie, *and* the children of Anne Monro.'

James M'Kenzie having died, the legacy became due to the persons above mentioned. Some difficulty, however, occurred in the mode of distributing it.

Of the children of the different families, one was not born till after the death of the testatrix, and several others who had *survived* the testatrix were *pre-deceased* at the time of James M'Kenzie's death, and one of these *had left issue*.

Doubts, therefore, arose, concerning the following points: 1st, Whether the division prescribed by the settlement should be made *in capita*, or *in stirpes*: 2dly, Whether the child born after the testatrix's death was entitled to a share: And, 3dly, Whether the issue, or next of kin

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of

of such of the children as survived the testatrix, but died before James M'Kenzie, had also a right to a portion.

In order to obtain, for the direction of his conduct, the judgment of the court upon the different claims resulting from these particulars, the trustee called all the parties interested into court, by a process of multiple-poining, when appearance was made for a considerable number of them.

Some of the *judges*, in reference to the first point, were of opinion, that the mode of expression used by the testatrix, in the above quoted clause of the deed, especially in the repeated insertion of the particle *and*, seemed to indicate an idea of a division between the several families, collectively, and not among the children of them all as mere individuals.

The judgment of the court, however, was as follows :

‘ Find that the sum of L. 700, bequeathed by Mrs Elizabeth Holte, ‘ in the event of the death of James M'Kenzie, to the children of ‘ Janet and Anne M'Kenzie, and Anne Monro, falls to be divided ‘ amongst the said children equally *in capita* ; and that each of ‘ the said children who existed at the death of the said James ‘ M'Kenzie, though born after the death of the testatrix, has ‘ right to an equal share thereof: And find that the *issue* of such ‘ of the said children, as died before the said James M'Kenzie, ‘ have right to their parents' shares of said legacy ; but that the ‘ *nearest in kin* of the children who died without issue before James ‘ M'Kenzie, have no right to any part thereof.’

Reporter, Lord Gardenston. Act. J. M'Kenzie. Alt. Elphinstone, and J. M'Kenzie, jun.
Clerk, Menzies.

S.

No. XXVIII.

February 7. 1781.

JAMES CUMING,

Against

ANNA GARDEN.

Right betwixt husband and wife.

IN 1775, Anna Garden was married to Alexander Cuming, who soon after purchased certain lands, and took the disposition of them ‘ to himself, and Anna Garden, his spouse, the longest liver of them ‘ two in conjunct fee and liferent, for the said Anna Garden her life-
‘ rent-use

‘ rent-use allenary, and to the child or children to be procreated be-
 ‘ twixt them in fee; whom failing, to the said Alexander Cuming, his
 ‘ own nearest heirs and assignees whatsoever.’

The marriage dissolved by the death of Alexander Cuming before a year after it took place had elapsed, and without any children having been procreated of it. A competition respecting the rents of the subjects above mentioned then arose, between James Cuming, the brother of Alexander, who had entered heir to him, and Anna Garden, his widow.

Pleaded for Anna Garden : It is admitted, that contracts of marriage, or settlements made solely *intuitu matrimonii*, fall, if it be not otherwise conditioned, by the dissolution, *within year and day*, of a marriage, of which no child has existed. But this rule being an unfavourable and ungracious one, is to be limited to those circumstances which, with strict propriety, fall under it. Hence it will not be extended to such a case as the present, in which there is no proper marriage-contract or settlement, but merely an unilateral deed, importing a donation by a husband to his wife, and which ought to be considered as a *donatio mortis causa*. Haddington, 6th February 1606, Lord Covington *contra* Veitch; Clerk Home, 6th November 1739, Hood *contra* Jack; and 24th July 1766, Hunters *contra* Brown.

Answered for James Cuming : The form of the deed was necessarily different from that of a contract of marriage: but, as the provision it contains is not only in favour of the wife, but likewise of the children of the marriage, it must be held as granted *intuitu matrimonii*.

Observed on the bench : It appears that the husband had made no other settlement on the wife. It was not in his power to have revoked the deed. This, therefore, was not a pure donation, and, consequently, must have been granted in contemplation of the marriage.

‘ The Lords found, that the disposition in favour of Alexander Cu-
 ‘ ming, and Anna Garden, his spouse, and longer liver of them,
 ‘ for her life-rent-use allenary, in so far as it provides the life-rent
 ‘ of the subjects therein mentioned to the said Anna Garden, be-
 ‘ came void by the dissolution of the marriage between the said
 ‘ Alexander Cuming and Anna Garden, by the death of the hus-
 ‘ band within year and day of their marriage, without a living
 ‘ child having existed thereof.’

Reporter, Hailes.

Act. Buchan-Hepburn.

Alt. Russel.

S.

No.

No. XXIX.

February 8. 1781.

*DAVID BALLARDIE, Tacksman of the Mill of Ledcarsie, and
the Proprietors of said Mill, Pursuers,*

Against

*ALEXANDER BISSET, Proprietor, and WILLIAM BISSET,
Tacksman of the East side of Meikle Fardel, Defenders.*

Thirlage.

PART of the barony of Fardel had been feued out to be held of the proprietor of the remaining parts of the barony, for payment of certain feu-duties; and, by the feu-rights, the lands feued were astricted to the mill of Redgodens, the mill of the barony of Fardel.

Mr M'Kenzie of Delvin was proprietor of the mill of Redgodens, and that part of the barony of Fardel not feued out; and he having purchased the mill of Ledcarsie, in the neighbourhood of the lands of Fardel, and which mill was turned by the same water that supplied the mill of Redgodens, thought it for his interest to allow the mill of Redgodens to go to ruin.

Theucken thirled to the mill of Redgodens were, *1mo*, The part of the barony of Fardel, Mr M'Kenzie's property; *2do*, The parts of that barony that had been feued out; particularly the defender, Mr Bisset's lands of Meikle Fardel; and, *3tio*, Some lands the property of Mr Kinloch of Gordie, and Mr Mercer of Lethindy.

An agreement took place between Mr M'Kenzie and Messrs Kinloch and Mercer, in consequence of which, Mr M'Kenzie sold them the thirlage of their own lands, and he prevailed upon the tenants of his own part of the barony of Fardel to go to the mill of Ledcarsie, in place of the mill of Redgodens; but Mr Bisset refused to frequent the mill of Ledcarsie with the grain of his lands of Meikle Fardel, which was thirled to the mill of Redgodens; and, after that mill had been allowed to go to ruin, Mr Bisset went to other mills with the produce of his lands, and continued so to do until Mr M'Kenzie's death, which happened about nine or ten years after the mill of Redgodens had been demolished; and, during that period, no action was brought to compel Mr Bisset to frequent the mill of Ledcarsie, in place of the mill of Redgodens.

After Mr M'Kenzie's death, an action was brought before the sheriff by the tacksman of the mill of Ledcarsie, who had formerly been tacksman of the mill of Redgodens, against the possessors of Mr Bisset's lands of Meikle Fardel, concluding that they should be ordained to frequent

quent the mill of Ledcarsie, in place of the mill of Redgodens; and found liable in certain quantities of grain, as the amount of the multure abstracted by them since the mill of Redgodens had been demolished.

In this process, appearance was made both for the tenant and proprietor of Mr Bisset's lands. They acknowledged that they were thirled to the mill of Redgodens, the mill of the barony of Fardel, of which their lands were part; but they contended, that they could not be compelled to frequent any other mill, though said mill was the property of the proprietors of the parts of the barony of Fardel not feued out.

It was *answered* for the tacksmen of the mill of Ledcarsie, and the proprietor of that mill, who sisted himself as a party, That said mill had been purchased by the proprietor of the mill of Redgodens, to which Mr Bisset's lands were thirled, and was as convenient for said lands as the mill of Redgodens was; and, therefore, these lands ought to be held as thirled to the mill of Ledcarsie, as coming in place of the mill of Redgodens, which had been allowed to go to ruin.

The sheriff repelled the defences, and ordained the defenders to depone upon quantities abstracted.

The defenders brought the cause into this court by advocacy; and the Lord Ordinary 'advocated the cause, and found the defenders liable in multure to the mill built by the late Mr Mackenzie of Delvin, 'upon the estate of Ledcarsie, in place of that formerly at Redgodens, 'in the barony of Fardel; and ordained them to thirle thereto accordingly, in time coming.' And to this interlocutor the court adhered, on advising a petition for the defenders, with answers.

A second reclaiming petition was presented, insisting, that the single point to be determined, was a question in law, viz. If the proprietor of lands, thirled to one mill, could be forced to frequent another mill to which his lands were not thirled.

The petitioners admitted being thirled to the mill of Redgodens, the mill of the barony of Fardel, of which their lands were part; but, as they never had frequented the mill of Ledcarsie, and were not thirled to that mill, they contended they could not be bound to frequent the same, although the mill of Ledcarsie belonged to the same proprietor as the mill of Redgodens did.

The petitioners argued, That thirlage was a predial servitude, and was so considered by every writer on the law of Scotland; and that all predial servitudes were real, not personal, rights: That the proprietor of either dominant or servient tenement, acquiring other properties, could not alter the servitude in any particular: That it was the *utilitas prædii dominantis*, that must be the rule and measure of a servitude, the advantage thence arising, though accruing to the proprietor of the dominant tenement, being in no other respect personal to him, than as consequential of his right of property in the dominant tenement.

This principle, it was contended, was clearly laid down in the Roman law; *Inst. de servit. præd.*; and in the law of Scotland, Bankton, B. 2. tit. 7. § 1. Mackenzie, B. 2. tit. 9. § 1. Erskine, B. 2. tit. 9. § 5. and § 18.

To oblige possessors of lands thirled to one mill, to go to another mill, was imposing a new servitude, without the consent of the proprietor of the servient tenement, which could not be. The proprietor of a mill, with a thirlage, cannot retain the mill, and sell the thirlage; and he can as little transfer a thirlage, by purchasing another mill. It is a matter of no consequence to a thirl, who is proprietor of the mill to which they are thirled. The mill is the tenement to which the thirl are bound, and it cannot be changed without the approbation of the thirl, no more than a servitude of fewel out of a particular moss, or of pasturage over certain grounds, could, at the pleasure of the proprietor of such moss or grounds, be changed or transferred to other mosses or grounds his property.

The respondents argued: Though thirlage is commonly called a servitude, is a very anomalous sort of servitude. Most other servitudes consist in *patiendo aut non faciendo*; but thirlage consists entirely in *faciendo*, as the person thirled must bring his victual to the mill to be ground. It is a general rule, that all servitudes shall have a *causa perpetua*; but this is not the case in thirlage, as it may have effect, though the mill, which is an artificial matter, may not exist. M'Dougal *contra* M'Dougal; Fountainhall, 28th February 1684. It is, therefore, an abuse of terms, and an innaccuracy of expression, in the writers on our law, to call thirlage a servitude.

Thirlage is more properly to be considered as a contract, and every contract implies a *bona fide* execution; and, if it is so implemented, law will not permit any of the parties contractors to harass the other, by insisting too rigorously upon the strict letter of the contract. In this case, the contract between the parties was sufficiently implemented by the pursuers furnishing the defenders with a proper mill to grind their grain at, in every respect as convenient for them as the mill of Redgodens was; and, therefore, in justice, the defenders ought to be obliged to thirle to the mill of Ledcarsie.

Upon advising the second petition for the defenders, with answers, this interlocutor was pronounced: '8th February 1781, The Lords find, that the petitioners are not thirled to the mill of Ledcarsie, and cannot be compelled to frequent the same; therefore assilzie the petitioners from the conclusions of the libel, and decern.'

And to this interlocutor the court adhered, 9th March 1781, on advising a petition for the pursuers, with answers for the defenders.

N. B. In this case, the parties differed somewhat in their state of the fact; the pursuers, contending, that the mill of Ledcarsie was, in every respect, as convenient for the defenders' lands, as the old mill of Redgodens was; and, in some particulars more so, of which they offered a proof; while the defenders, on the other hand, alledged, that the mill of Ledcarsie was not so convenient. But the court paid no regard to these allegations, in fact, on either side; but considered the question altogether as a point of law.

A&. A. Crobie.

Alt. A. Elphinston.

Clerk, Tail.

No.

No. XXX.

February 10. 1781.

GEORGE HALDANE,

Against

THOMAS TRAILL.

Member of Parliament. Apparent heir. The act 1594, c. 218. applies to freehold claims.

AT a meeting of the freeholders in the county of Orkney, in 1780, Mr Traill demanded an enrolment, in the character of apparent heir.

In support of this claim, he produced two retours of the ancestor, and the instruments of seizin following thereon, both dated in 1723, and duly recorded.

To this claim Mr Haldane

Objected: To connect an instrument of seizin with the retour upon which it proceeds, it is necessary to produce the precept issued from the Chancery, by which the sheriff is warranted to infect the person served, in the lands contained in the retour. Without this, the feudal title is incomplete, and could not be the foundation of a freehold claim in the person of the ancestor. Of necessary consequence, Mr Traill's neglecting to exhibit the precepts must, in terms of the statute 16th Geo. II. prove fatal to his enrolment.

Answered: Mr Traill and his predecessors have been in possession of these lands for more than 40 years, upon heritable titles. They are, therefore, by the statute 1594, c. 218. freed from the necessity of producing the precepts of seizin, upon which their infeftments have proceeded.

'The Lords repelled the objection.'

N. B. This gentleman's claim was rejected by the court upon another ground, which was, his not having properly ascertained the valuation of his lands.

Objector, *Ilay Campbell*, et alii.

Alt. *Rolland*, et alii.

Clerk, *Tait*.

G.

No.

No. XXXI.

February 10. 1781.

M O O D I E,

Against .

B A I K I E.

Member of parliament.—The necessary titles of a claimant must be produced before the freeholders.

MR MOODIE, claiming to be enrolled as a freeholder in the county of Orkney, in the character of apparent heir, produced his ancestors' feizin, but not the charter upon which the feizin proceeded.

To this production Mr Baikie

Objected: By statute 16th Geo. II. no person can be admitted to the roll of freeholders, as apparent heir, who does not exhibit a complete feudal title, in the person of the ancestor. An instrument of feizin is merely a relative writing, to which no credit can be given, if unsupported by the charter or other deed to which it refers.

This objection was *sustained* by the freeholders. Mr Moodie *complained* to the Court of Session, and there exhibited the predecessor's charter. But

' The court dismissed the complaint.'

For Mr Moodie, *Ilay Campbell*, et alii.

Alt. *Rolland*, et alii.

Clerk, *Tait*.

G.

No. XXXII.

February 13. 1781.

THOMAS BOSTON, and others, children of ELIZABETH
HORSEBURGH,

Against

ALEXANDER HORSEBURGH.

Mortis causa donatio.—Clause.

IN 1736, Doctor David Horseburgh executed a deed, by which,
' for the love and favour he bore to John Horseburgh of Horse-
' burgh, his brother, he assigned and disposed to him, *his heirs, exe-*
' cutors,

'*cutors, or assignees*, the whole effects and debts that should happen to belong, or be due to him *at the time of his death*; with full power to the said John, whom he thereby nominated his sole executor, (but of whose heirs, it is to be remarked, no farther mention is made) to possess and dispose of the premises.' Then follows a reservation of a power to revoke, 'without consent of his brother above named;' and, after this, an obligation 'upon the said John to pay the Doctor's debts.' And the disposition concludes with a clause dispensing with delivery. But, throughout the whole deed, the mention of heirs is never repeated.

John Horfeburgh, who afterwards was married, died several years before the Doctor, leaving a son, the above named Alexander; who, at the Doctor's death, in 1779, obtained himself confirmed *executor-dative qua* disponent or creditor to him, under the aforesaid settlement, which, it appeared, had been retained in the custody of John.

Soon after, Thomas Boston, and the other children of a sister of the Doctor and of John, raised an action against Alexander, concluding, 'That, as the deed in question was a testament, or *donatio mortis causa*, which, by the survivance of the granter, had fallen and become void, so they, being, equally with Alexander, his next of kin, were entitled to a proportional share of his moveable effects.' In support of this action,

The pursuers pleaded: The disposition of moveables above mentioned, as is evident from its terms, importing only a *donatio mortis causa*, could not, during the life of the disposer, vest the disponent in any right whatever. The general rule, then, relative to this subject is, *Tempus mortis inspicendum*; and, accordingly, if the circumstances occurring at the testator's death, be inconsistent with the destination of such a deed, it must for ever continue ineffectual, as it can receive no new force by any artificial interpretation, accommodated to those circumstances.—From this principle, and from the presumption of particular favour, in the case of such donations or legacies, it would most indubitably follow, that the settlement in question has become void; were it not on account of the words, 'heirs, executors, or assignees,' which once occur in that deed.

But these words seem to have been admitted *per incuriam*. The deed is in the Doctor's own hand-writing, who, being no lawyer, must have copied it after some other conveyance, and probably one of heritable subjects, from which he inadvertently may have allowed the above clause once to creep into it; a supposition that is fully justified by a proper construction of the deed. Thus, from particular favour to John, it transfers those effects which should belong to the Doctor at the time of his death; the survivorship of the former being evidently supposed; who alone, personally, and not his heirs also, is nominated executor. John too, solely, is empowered to possess himself of the premises; and it is he only who is understood as accepting the disposition; for, upon him, and no other, the burden of the debts is laid. And, in reserving the faculty of revocation, the Doctor provides only, that John's own consent should not be requisite, without making any reference to his heirs; thus plainly intimating, that they were not at all in his contemplation.

plation. Besides, if a literal interpretation of the words were to be adopted, John's assignees must thence have had an equal title with his heirs, which surely cannot be maintained.

It, therefore, was not the intention of this testator, that the heirs of John should succeed to him; and, according to the purpose of a testator, all testamentary deeds are to be interpreted. A legacy bequeathed to a person, and to *his heirs or executors*, will, indeed, devolve to the latter, notwithstanding that the testator has survived the former; but then, as in the case of Inglis *contra* Millar, 16th July 1760, Facult. Coll. the testator's meaning must be clear to that effect. If it can be shown that he had no such intention, the mere occurrence of those words will be disregarded; Voet. lib. 39. tit. 6. § 17.; Ruffel *contra* Ruffel, 10th March 1769; Scott *contra* Carfrae, 13th December 1769, Facult. Coll.

Answered by the defender: It is not to be disputed, that a legacy may fall, by the predecease of the legatee. But if, as in the present instance, the heirs of the legatee are called, not as substitutes, but as conditional institutes, the legacy cannot lapse; Ersk. Inst. p. 603.; Inglis *contra* Millar, *sup. cit.*; Denham *contra* Denham, January 1726, Remark. Decis. The objection, as to no mention of heirs having been made in the subsequent part of the deed, is groundless. Being mentioned in the dispositive clause, it is of no consequence that they are not again expressly referred to in that containing the nomination of executor; because, without this part altogether, the disposition would have been valid and effectual. The authorities quoted on the other side are therefore, not applicable. And, with respect to what is said of assignees, it is well understood, that the power of assigning can only have effect after the succession hath devolved.

The Lord Ordinary had found, that the deed, being of a testamentary nature, or a *donatio mortis causa*, had become void by John Horfeburgh's predecease. But

The court 'altered this judgment, and found the disposition effectual to the heir of John.'

Lord Ordinary, Kennet.

Act. Rae and Elphinston.

Alt. Ilay Campbell.

Clerk, Orme.

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No.

No. XXXIV.

February 13. 1781.

DOUGLAS, HERON, and Co.

Against

ROBERT ALEXANDER.

Bill.—Proof of dishonour being notified.

ALEXANDER, for behoof of Douglas, Heron, and Company, indorsed a bill to John Christian, their cashier at Ayr, and who was likewise one of their numerous partners. Being dishonoured, it was regularly protested; and a note, under the hand of Christian, appearing on the back of it, bore that the dishonour had been duly intimated to Alexander. Diligence having followed, a suspension was raised; in the course of which process, Christian emitted an oath, corroborative of the above mentioned marking.

Pleaded for the suspender: Christian, being not only the cashier, but likewise a partner of the Company, his testimony is inadmissible.

Answered for the chargers: It is a method universally received in mercantile practice, to notify the dishonour of bills verbally, or by a card, without the writing of a formal letter, a copy of which is to be entered in the letter-book. Hence, if cashiers, or other persons entrusted with the affairs of merchants, be not admitted as habile witnesses, it will often be impossible to obtain any proof in such a case; and it would be very hard, were the possession of a small share in the stock of a Company to disqualify them. Upon these grounds the court determined the question between Sir George Colebrooke and Co. and William Douglas and Co. July 1780; a case, in every particular, similar to the present.

The court ‘found the intimation sufficiently proved.’

Lord Ordinary, Kennet.

Act. Wight.

Alt. Macormick.

Clerk, Tait.

S.

No,

No. XXXV.

February 13. 1781.

DAVID and HUGH MITCHELS,

Against

WILLIAM FERGUSON.

Personal and Real.

AGNES CARSON purchased a house from William Donald, of which he executed a disposition in her favour. She then entered into the possession; but, without being infeft, assigned the disposition to William Ferguson; who likewise omitted to take infeftment.

Meanwhile, David and Hugh Mitchels, creditors of Donald, led an adjudication of the subject, upon which they were infeft. And thence arose a competition between these adjudgers and Ferguson; the latter, *qua prior* disponent, with a personal right only; the former, *posterior* adjudgers, but whose diligence had been completed by infeftment.

Pleaded for Ferguson: Within the legal, an adjudger, though infeft, and in possession, is, in the judgment of law, not properly vested in the feudal right; nor is he protected against even the personal deeds of the reverser; notwithstanding that these do not appear in any public record. For, says Lord Stair, (3. 1. 21.): ‘Because apprisings within the legal may be taken away in the same manner as personal rights; therefore assignations, discharges, and back-bonds, by those who have right to the apprising, being made within the legal, are effectual: But, after expiring of the legal, infeftments upon apprisings are in the same case as infeftments upon irredeemable dispositions.’ And, to the same purpose, Lord Bankton, (3. 2. 60.). Again, it is clear, that, within the legal, the right of an adjudger may be extinguished in such a manner as is not discoverable by means of any public register; for example, by a discharge merely, or, *ipso facto*, by intromission; so that registration is not requisite to render any deed effectual against a right of that kind; Erskine, (2. 12. 36.).

Now, according to the adjudgers’ own plea, if, prior to their infeftment, seizin had followed on Donald’s disposition, and had been duly recorded, all effect of their diligence must have been precluded. But, as it has likewise become evident, that it is no sufficient objection to a deed affecting the right of an adjudger, though infeft, if, before expiry of the legal, either that such a deed is only personal, according to Stair, or that it is latent and unregistered, agreeably to Erskine; it follows, that, in the present case, seizin was not necessary to make the disposition effectual against the subsequent adjudication.

To

To this simple deduction, it cannot reasonably be objected, that the personal deeds of an adjudger have a stronger effect against his singular successors, than those of the proprietor himself, executed at a time when his right was unlimited, could produce against the adjudger.—This were to suppose adjudgers to derive from proprietors, more extensive rights than these last themselves could claim. On the contrary, it is to be remarked, that a singular successor to an adjudger, is in a more favourable situation with respect to his author, than the adjudger is, as to the reverfer; because the former has a direct reliance on the subjects adjudged; whereas the latter, prior to his adjudication, may not have had them at all in his view.

This question may be placed in another light, flowing from more general principles. A person who grants a second disposition *in fraudem* of the first, is thereby guilty of a crime. This, then, is an act which the law will compel no man to perform. But will it, nevertheless, interpose itself in the place of the disponent, and, in effect, do the very same thing, by adjudication? That idea seems equally repugnant to common sense and to law. It is clear, that a prior disposition, with or without ineffectment, is preferable to every subsequent personal one. And, though it is likewise true, that a subsequent disposition, by being clothed with ineffectment, may become effectual against the prior remaining personal; yet this consequence is widely different from the case supposed: For, notwithstanding that the *dolus* of the disponent has occasioned the second conveyance, which thus becomes valid in law, still the law by no means gives force or effect to that fraud. The statute 1617 has appointed records as the medium through which information, concerning the conveyance or the burdening of lands, is to be communicated. If a *bona fide* purchaser, who, upon the faith of this legal information, bargains and pays his money, were, by a personal and latent deed of his author, to be cut out from his purchase, his situation would be more severe than that of the person who had obtained that deed; because, besides labouring equally with the latter, under the deceit of his author, he would also have been deceived even by the law itself, which had established the credit of its records; a thing too absurd to be imagined. But, as it is merely through a just confidence in these, that a second disponent is rendered secure; so a posterior adjudging creditor, who did not contract in reliance upon them, but trusted solely to the personal security of his debtor, can no more exclude an anterior disponent without ineffectment, than with it appearing on record. So far as concerns the lands adjudged, the latter has no *bona fides* to plead, respecting either his debtor or the law; since, had he not relied on his debtor's personal security merely, he would have taken heritable security.—In a word, a disponent is entitled to demand the subject conveyed, according as it appears from the records. An adjudger, on the other hand, having no reliance on these, must be contented to take that which he has adjudged, *tantum et tale*, as it stood in the person of his debtor.

This doctrine is confirmed by the following additional authorities: Dirleton's Doubts, *voce* Comprising, and Sir James Steuart's answers, where it is laid down, that rights pass to adjudgers, *cum sua causa et*

labe. The decisions from 1670, downwards, as stated by Stair, support back-bonds against adjudgers. The case of Neilson, 28th January 1755, comes still closer to the point: Also Gibb *contra* Livingstone, 14th December 1763. In that of Bell against Garthshore, in 1737, Rem. Dec. the distinction between adjudgers and disponees, not having been stated, was not attended to. See likewise Menzies *contra* Gillespie, 8th December 1761.

Answered for the adjudgers: Such is the nature of feudal rights, that they cannot be affected, qualified, or burdened by any personal deed. Notwithstanding even a conveyance, if only personal, the feudal right still remains in the disponer.

This principle is firmly established by the judgment of the court, in the case of Bell *contra* Garthshore, mentioned by the disponee; in which it is true, the argument, with respect to adjudgers taking only *tantum et tale*, was not touched; a sign of its not being solid. The only question then agitated was, whether a *personal* disposition were not sufficient to denude the disponer of a feudal right remaining merely personal. But the principle of that decision, which likewise determines the present question is, that *personal deeds cannot affect feudal rights*. From this principle it arises, and not from any effect of *bona fides*, that a second disponee, the instant he is infeft, excludes the prior remaining without infeftment. For, though *mala fides* may cut down a title, no *bona fides* can, of itself, create a right. Even the statute 1617, on which the disponee chiefly founds his argument, is a strong authority for the adjudgers on this point. It has prescribed the registration of seizins and reversions; and why not also of dispositions? The reason is, that the former, in their nature real, may qualify a feudal right, which the latter, being personal, cannot. As for the argument, that the law ought not to do what the disponer himself could not lawfully do, it is quite deceitful. A bankrupt debtor cannot, indeed, lawfully dispose to any one of his creditors, in prejudice of the rest; but is none of them entitled to adjudge? Again, if a man grants one disposition without procuratory and precept, and afterwards to another disponee, a second with both, he cannot, it is true, *bona fide*, execute a third conveyance in favour of the first disponee; yet surely this disponee is not precluded from leading an adjudication in implement. All the decisions quoted on the other side, as also the opinions of Dirleton and Steuart, refer to the act 1621, and to those *fraudulent* rights acquired in contravention of that statute, which an adjudger must take *cum sua labe*.

Were the opposite doctrine to be received, many opportunities would be afforded for the commission of fraud. Thus, for example, our marriage-contracts are sometimes framed in the English form, bearing a conveyance, *de presenti*, to trustees, who may not perhaps infeft themselves. Creditors ignorant of this conveyance lend their money, lead adjudications, and justly think themselves secure. Upon the footing of this doctrine, however, the trustees, by that personal deed, would preclude them. Or, suppose a man owing debts to grant an heritable bond without infeftment, and afterwards to borrow money from other creditors,

creditors, who, for their security, adjudge. By that latent bond, according to the same doctrine, they may be totally cut out.

The plea of the adjudgers is also supported by these authorities: Ranking of the creditors of Sir John Douglas of Kilhead, 22d February 1765; Countess of Caithness, and Lady Dorothea Primrose, against creditors-adjudgers from Earl of Roseberry, 8th November 1744, Kilker. p. 384.

The court, on a hearing in presence, ' Found, that the adjudication
' and infestment following upon it, are preferable to the personal
' disposition founded on by Ferguson.'

Lord Ordinary, *Monboddo*.

Adv. *Rae, G. Ferguson*.
Clerk, *Colquhoun*.

Adv. *McLaurin, McCormick*.

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No. XXXVI.

February 14. 1781.

ROBERT M'KINLAY,

Against

WILLIAM EWING.

Judicial cautionry.—Form of attestation.—Septennial limitation.

IN a process of suspension, of a charge, at the instance of Ewing against James Macadam, John Macadam was offered as cautioner to the clerks of the bills, who consented to receive him, upon having put into their hands the following letter, addressed by M'Kinlay to the suspender's agent: ' 8th August 1771. I understand John Macadam, ' tenant in Stockrodgeart, has become cautioner for James Macadam ' tenant in Bellock, in the suspension at his instance, against Robert ' Ewing of Lochend, and that he is refused at the Bill Chamber; I ' therefore hereby attest, that the said John Macadam is a sufficient ' cautioner in said suspension, and is able to pay the sums charged ' for.'

This missive was subscribed by M'Kinlay; but was not holograph; nor was the subscription attested by witnesses. The subscription, however, was judicially acknowledged.

In 1779, Ewing having previously discussed both the suspender and cautioner, raised an action against M'Kinlay, as attester of the sufficiency of the latter.

Pleaded by the defender: In the *first* place, the letter founded on by the pursuer contains nothing farther than a declaration, that the
cautioner

cautioner was sufficient at the time. It by no means imports any obligation upon the defenders to become liable, *subsidiarie*, in the event of his future insufficiency. In order to produce this obligation, the form prescribed by act of federunt, 27th December 1709, would have been requisite, by which ' attesters of cautioners are to be taken bound ' as fully as the cautioners themselves.' *Secondly*, The missive is defective in the statutory solemnities. And, *thirdly*, Though it were valid, both in substance and form, it would fall under the septennial prescription of cautionary engagements, introduced by act 1695, cap. 5. which, from its spirit and design, should be interpreted to extend equally to all cautioners, whether judicial or extrajudicial. Nay, if even the strict letter of the statute be adopted, the former, as well as the latter, may be said ' to be bound and engaged in bonds or contracts for sums.'

Answered by the pursuer to the first defence: The nature of the obligation incurred by the defender appears from the circumstances of the case, from the whole strain of the letter, and especially from the words, ' I hereby attest,' &c.

To the *second*: The judicial acknowledgment of subscription saves from any legal nullity supposed to arise even from the statute 1681, 26th December, Beattie *contra* Lambie, Fount.; but especially in the case of missive letters; Crawford *contra* Wight, 16th January 1739; Foggo *contra* Milligan, 20th December, 1746; Neil *contra* Andrew, 8th June 1748, Kilker. And, indeed, in all cases, where writing is not essential to an obligation, it would seem that such an acknowledgment ought to have that effect; since, at first, nothing more would have been necessary to constitute the obligation.

Answered to the third defence: The principle of the septennial limitation is none of the presumptions on which prescription is founded. Hence the objection of *non valentia agendi*, is not applicable to this limitation. According to the defender's doctrine, then, were a litigation to be protracted during the whole of the seven years, as its termination, when only the bond could possibly become effectual, the cautioner would, *ipso jure*, be liberated. In this manner, judicial cautionary might be rendered a vain and useless ceremony. But besides, that this interpretation of the statute would, in its consequence, annihilate that security, it seems in itself truly impracticable. Thus, the cautioner is bound, not only for the amount of the matter in dispute; but likewise for the expences of the process. These, it is plain, increase gradually; and consequently, at a variety of successive periods, give rise to an equal variety of obligations. Is a new term of prescription then to commence with each of the obligations? Or, can they be understood as running a course of prescription before they shall have existed?

The Court desired to know the practice of the Bill Chamber, with respect to the form of attesting judicial cautioners; and the answer made by the clerks was, That, in order to render an attester liable *subsidiarie*, they were in use to require compliance with the form prescribed by the act of federunt; and would not have considered the letter in question as sufficient for that purpose.

It

It was not necessary to give judgment with respect to the statutory solemnities. With regard to the other two particulars, the Lords found, ' That the act 1695 does not apply to cautionary obligations in judicial proceedings in suspensions; but sustained the defence, that the attestation was irregular and invalid.

Lord Ordinary, *Westball.* A.S. *Morthland.* Alt. *McCormick.* Clerk, *Menzies.*

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No. XXXVI.

February 14. 1781.

D A V I D E L L I O T,

Against

J O H N B E L L.

Bill.—Whether notification of dishonour to the last indorser preserves recourse against the prior.

WILLIAM BELL granted to John Bell his promissory note for L. 560. John Bell indorsed this note to John Grant, by whom it was again indorsed to David Elliot.

Elliot not having recovered payment from William Bell, the granter of the note, intimated the dishonour to Grant, the last indorser, but made no intimation to John Bell, the prior indorser; against whom however, he raised an action for his recourse.

Pleaded for John Bell: Timeous notification of dishonour must be made to every indorser, whether prior or posterior, upon whom recourse is to be had. It is admitted, that regular intimation to the last indorser is necessary to preserve any recourse, even against him; but this intimation cannot, *per se*, have the effect to save recourse against the prior indorsers. Mercantile practice has not established such a consequence, in itself so unreasonable. An opinion, given by one of the most eminent merchants in Britain *, is produced in process; from which it appears, that the practice is to notify to all the indorsers upon whom recourse is claimed; to the last indorser, within the legal time; to the prior, within a space as yet unsettled, but such as is not protracted by any undue delay. Timely intimation affords means of operating relief, which, it is evident, delay may often frustrate. Besides, without such intimation, a prior indorser is naturally put off his guard against an unforeseen demand; a circumstance that loads, with a grievous additional hardship, the power of making the demand. For what limit, in point of time, can be set to this power? It is indeed no other than the long prescription; for that introduced among bills by the late act of parliament extends not to the ground of debt. Hence, at any moment, and to any extent, however enormous, a merchant might be surprised with formidable claims, rising out of old bill transactions, of

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which

* Sir Robert Herries.

not even the least remembrance. Such would be the unavoidable consequences of the pursuer's doctrine. On the other hand, no inconvenience results from that of the defender. A person gives value for a bill on the credit of such names only appearing upon it, as he knows, not of those he is ignorant of; and, of course, it must be easy for him to make the requisite notification.

With respect to authorities, there occur no decisions of the court on this point; nor are any of the decisions given in England precisely applicable. See, however, Forbes on bills, cap. 6. § 16; and in Cuning. Abridg.; Strange, 707.; Pepy's versus Sir John Lambert; also, *ibid.* § 9. p. 16.; Scarlet on bills, § 5. cap. 19. See likewise *Ordinance of France* respecting bills of exchange.

Answered: It is an undisputed point, that every person who, either as drawer or as indorser, puts his name upon a bill, thereby, to the extent of the sum it contains, pledges his security to every posterior holder; unless he chooses to avoid this consequence, by subjoining to his subscription the words, 'without recourse.' From the nature of that obligation, it is evident, no necessity arises to the holder to give any other notification than his own discretion should dictate. The expediency of commerce, indeed, may prescribe, and has prescribed certain limits to this freedom; as, by the appointment of intimation itself, and the regulation of the time within which it is to be given to the last indorser. But no additional obligation has been created to force notification to any prior indorser. Making intimation thus necessary to every one of a numerous train of persons whose names appear on bills, but many, or most of whose additions or designations may be unknown to the holder, would mightily embarrass mercantile transactions. It is a mistake to suppose that a merchant never trusts to the security of persons of the latter description. He may be ignorant of their designations, or of the places of their residence, yet well enough acquainted with their character, in respect of credit. He may, even though uninformed of all these circumstances, properly place confidence in names, strange to him, when he sees that certain prior holders whom he knows have already trusted to them. Hence it appears, that the obstruction to the usefulness of bills which would follow, were the opposite doctrine to prevail, consists not only in a tedious and burdensome incumbrance, but even in an actual diminution of the security which they afford; while the inconvenience stated by the defender is almost imaginary, since it can occur only in a very few singular instances, like the present. For, it is plain, the sense of his own interest must instantly prompt the last indorser to communicate the notice of dishonour to the immediately preceding one, who, in the same manner, will give it to the second, he to the third, and so *retro* up to the drawer. Here, then, a disadvantageous consequence, that of necessity can but rarely happen, is set in opposition to others likewise pernicious, which as necessarily must be continually occurring.

Though there are no decisions of the court on this point, yet the pursuer's plea is supported by Erskine, 3. 2. 27.—33.; and by Stat. Geo. III. 12. cap. 72.: And, with respect to the law of England, by Stat. Wil. III. 9. 10.; Burrow's Rep. vol. 2. p. 669.

The

The Lords found, ' that notification to the last indorser was not, ' *per se*, sufficient to preserve or establish recourse against the ' prior indorsers.'

Lord Ordinary, *Alva*. A&T. *Hay Campbell, H. Erskine, and Arch. Campbell*. Alt. *A. Crosbie* and *Alex. Ferguson*.

S.

No. XXXVII.

February 15. 1781.

WILLIAM MACDOWAL of Castlesemple,

Against

ROBERT JAMIESON.

Hypothec.—Poinding.

IN September 1777, Jamieson, who was a creditor to Robert Stewart, a tenant of Castlesemple's, executed a poinding of certain cattle belonging to Stewart that were on the farm; upon which the landlord brought an action of spuilzie against Jamieson, who

Pleaded in defence: A landlord's hypothec on the stocking of his tenant's farm, unless extended by sequestration to the individual parts that compose it, is purely general, and imports only a right in it as an *universitas* merely, without any respect to its amount being greater or less. Hence it is clear, that, if no sequestration has been used, the tenant may dispose of any part of it by sale, which will be effectual to a *bona fide* purchaser; and if, by a voluntary sale, a purchaser may thus acquire the property of stocking, it surely cannot be denied to an onerous creditor, who has followed out the legal course of diligence.

Answered for the landlord: Though the premisses in this argument are admitted, the conclusion does not follow. The case of a creditor is different from that of a *bona fide* purchaser. For a creditor attaches, by legal diligence, the right of his debtor, *tantum et tale*, precisely as it stands in the debtor's person; subject, for example, as in the present case, to his landlord's claim of hypothec.

The Lords ' found the defender liable to the pursuer for the value ' of the goods carried off, and intromitted with by him.'

Lord Ordinary, *Elliot*.

A&T. *W. Wallace*.

Alt. *Baillie*.

Clerk, *Menzies*.

S.

No.

No. XXXVIII.

February 20. 1781.

JOHN MONRO, Procurator-fiscal of the High Court of Admiralty,

Against

*MAGISTRATES of EDINBURGH, and their
ADMIRAL-DEPUTE.**Jurisdiction of the High Admiral, privative in questions relating to prize
vessels.*

CAPTAIN WATT of his Majesty's navy, having brought into Leith-road an American ship which he had captured, instituted an action for condemnation of the vessel, before the Admiral-depute of Leith. Mean time, an application for an interdict to stop procedure in this action was made to the High Court of Admiralty by the procurator-fiscal, who alledged its exclusive jurisdiction in the condemnation of prize vessels. The Judge-admiral having granted the interdict, a bill of suspension, complaining of it, was presented to the Court of Session by the Magistrates of Edinburgh and their Admiral-depute; in consequence of which, this question of controverted jurisdiction was discussed in the following manner:

Pleaded for the suspenders: By a charter under the great seal, in 1616, James VI. conferred on the magistrates of Edinburgh the jurisdiction which they claim, in these explicit and comprehensive terms: 'Igitur nos fecimus, constituimus, et ordinavimus, præpositum, balivos, et consules burghi de Edinburgh, eorumque deputatos, præsentis et futuros, eligend. judices omnibus nautis magistris ac navigatoribus frequentantibus, vel qui ad dictam villam de Leith tempore affuturo frequentari contigerint, tam nostris subditis quam peregrinis de quacunque patria vel natione, in omnibus maritimis, lre, seyfaring aliisque actionibus et causis quibuscunque, prosequendis,' &c. This grant was, in 1636, confirmed by a charter of Charles I. which was ratified in parliament.

Under the authority of these royal charters, the magistrates of Edinburgh have been ever since in the constant use of exercising, by one of their number, whom they appoint Amiral-depute of Leith, a jurisdiction in all maritime causes, without exception. No intervening act of the legislature hath abridged their power of judging in the first instance. The statute 1681, cap. 16. only subjects their sentences, in common with those of all the other inferior admirals, to the review of the high court, of which, it appears, they had been formerly independent; the Court of Session alone having been then competent to review them.

And

And, by the treaty of union, it is provided that the several admiralty jurisdictions shall remain, in all time to come, free from any material alteration.

Now, it cannot be disputed, that an action relative to the condemnation of an enemy's ship, is, in the most proper sense of the words, a maritime cause. Indeed, were it otherwise, what would be the Judge-admiral's own title to claim jurisdiction in the present question?

With respect to the evidence of the actual practice in this case, it happened unfortunately, that, in 1745, the rebels destroyed all the records of court. But, in 1762, an action was brought before the Admiral-depute for condemnation of the Duc de Broglie, a French privateer; and there, too, the Judge of the High Court interfered, by issuing a writ of proceedings. The Court of Session, however, unanimously passed a bill of suspension of that writ. The Admiral-depute pronounced sentence of condemnation, and it was carried into execution.

Answered for the procurator-fiscal: The office of High Admiral was long distinguished for the amplitude of its powers, both civil and military. The judicial department of the former is now exercised by the Judge of the High Court of Admiralty, of whose jurisdiction the nature and extent appear from act of parl. 1592, cap. 160.; 1609, cap. 15.; and from 1681, cap. 16. which last statute 'declares the High Court of Admiralty to be a sovereign judicature, and that the High Admiral, as he is his Majesty's lieutenant and justice-general on the seas, so he hath the sole privilege and jurisdiction in all maritime and seafaring causes, foreign and domestic, within the realm; and prohibits and discharges all other judges to meddle with the decision of any of the said causes in the first instance, except the Great Admiral and his deputies alienarly.'

That the power of judging in the condemnation of prizes always belonged to the High Admiral and his deputies, is therefore unquestionable; and that they held it exclusively is not less certain. During the two Dutch wars which subsisted in the reign of Charles II. many prizes were brought into the port of Leith, all of which were tried for condemnation in the High Court. Accordingly, in the written instructions sent by government for regulating the important public questions that might thence have arisen, no court or courts of admiralty are mentioned, save the High Court alone. These instructions were contained in letters addressed sometimes to the Privy-council, and sometimes to the Court of Session, among whose acts of sederunt the letters are still extant, particularly one, dated 18th December 1680, which makes mention of another of 29th June 1673. And Lord Stair, who sat in the Court of Session in that very period, when a variety of questions occurred, which he himself has collected, respecting the condemnation of prizes, declares 'the Lord Admiral to be the sole judge, in the first instance, of all prizes taken at sea;' (Instit. 2. 2. 5.); which privilege, secured by the 19th article of the treaty of union, remains inviolable; Lord Bankton, (4. 12. 2.).

On the other hand, with regard to the Admiralty of Leith, it appears that the magistrates of Edinburgh antiently possessed, in that district, no more than a right of water-bailiary, for making effectual
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their port-dues or customs ; which, however, before the regular establishment of admiralty-courts, might have been sometimes extended to the decision of civil questions occurring among mariners. Conformable to this original limitation of their power, is their *Golden Charter*, as it is styled, granted to them by King James VI. in 1603, which serves to explain the subsequent one in 1616, founded on by the suspenders ; as, indeed, this is also illustrated by that in 1636, which contains an express reservation of all the liberties, privileges, and jurisdictions competent to the High Admiral. It, therefore, was never meant to confer upon them the jurisdiction which they claim ; nor do they stand on any better footing than the deputy-admirals of particular districts.

Neither, indeed, were it reasonable that a power, of such political magnitude, should be exercised by any other than a court of the most public establishment, and whose dignity may bear proportion to the important consequences of decisions connected with the national safety ; consequences that would but ill suit with the comparative meanness of local admiralties, from which this territorial jurisdiction is not to be distinguished.

The circumstance relative to the condemnation of the Duc de Broglie French privateer in 1762, was occasioned by the indisposition of the gentleman then procurator-fiscal of the High Court, having prevented him from giving the requisite attention to that business.

The Lords found, ‘ That the Admiral-depute of Leith had no jurisdiction in the cause, and refused the bill.’

Lord Ordinary, *Braxfield*.

Añ. *Blair*.

Alt. *M'Leod*.

S.

No. XXXIX.

February 20. 1781.

Captain DAVID COLLINS,

Against

The JUDGE of the High Court of Admiralty.

Jurisdiction.—Interim appointment of a procurator in the High Admiralty Court.

A COMPETITION with respect to a Dutch prize-vessel, which had arisen between Captain Collins of his Majesty's navy and three other parties, came before the High Court of Admiralty. But one of the

the three ordinary procurators belonging to that court being retained by each of the last mentioned parties, no one remained to conduct the suit in behalf of Collins. He, therefore, presented a petition to the judge, praying that William Sprott, solicitor before the inferior courts of Edinburgh, might be permitted to act on this occasion as his procurator. His petition, however, being refused, he then applied to the Court of Session by bill of advocation; in opposition to which the Judge-admiral

Pleaded: According to immemorial consuetude, the only persons entitled to practise in the Admiralty-court, beside the limited number of three ordinary procurators, are the Faculty of Advocates; nor can any litigant ever want ample assistance from so numerous and so learned a body.

Answered by Collins: It is a jest to pretend that the detail of proceedings in that court can possibly be conducted, by any other persons but those who have had an opportunity of being habituated to every minute circumstance of its intricate forms of process; a thing which the province of an advocate does not even admit.

The Lords did not enter into the questions, with regard to the foundation of the immemorial custom pleaded by the Judge-admiral, nor to the qualifications requisite in a practitioner before his court. They considered this case as affording an example of a wrong, to which no ordinary remedy could be applied, but for which their supreme jurisdiction authorised them to provide an extraordinary one; in the same manner as in all those more important instances, where any accidental stop having been put to the usual course of administration, in distributing justice, or in regulating police, it is their privilege, by temporary appointments, to supply the deficiency.

Accordingly, the Lords ‘ remitted the cause to the Judge-admiral,
‘ with an instruction to admit Sprott, without delay, to act in
‘ the cause as procurator for Captain Collins.’

Act. Croftie.

Alt. Blair.

S.

No.

No. XL.

February 27. 1781.

J A M E S G O R D O N Tenant in Corrinachie,

Against

*J A M E S G O R D O N Tenant in Inchbroom.**Battery, pendente lite.*

APETITION and complaint was presented to the court, by the former of these parties, setting forth, that the latter, prompted by resentment, on account of an action then depending between them before this court, had been guilty of an assault and battery against him, and craving judgment, in pursuance of the statutes 1584, cap. 138. ; and 1594, cap. 219. relative to battery *pendente lite* ; to which it was

Answered : That these statutes, in consequence of the change of our national manners, have properly gone into disuetude.

The Lords found ‘ the statutes to be still in force, and allowed a ‘ proof.’

*Act. Elphinston.**Alt. Alex. Abercrombie.*

S.

No. XLI.

March 1. 1781.

The G O V E R N O U R and C O M P A N Y of the Bank of Scotland, and others,

Against

The G O V E R N O U R and C O M P A N Y of the Bank of England.

General burden.—Act 1696, cap. 5. Novatio debiti.

THE Company of the Bank of England entered into the following agreement with Messrs Alexander merchants in Edinburgh. On the one hand, the former, who had previously discounted bills to a great amount, drawn by the latter on two particular banking-houses in London, were still to continue to discount such bills to a farther extent,

tent, but 'so as the same should not exceed, at any one time, together with the bills already discounted by them, as aforesaid, and then remaining in their hands, the sum of L. 160,000.' And, it is here to be remarked, that the rules of the Bank of England made it necessary to retire those bills every three months; which was done by substituting new ones, and having them in like manner discounted. On the other hand, Alexanders, by a personal obligation, bound themselves to convey to the Bank-company, for their security, certain West India estates, and likewise that of Cluny in Fife-shire; in implement of which, a *disposition in security* of the last mentioned lands, was executed in favour of certain trustees; and upon this conveyance infestment followed, after all the money had been paid by the Bank.

In the ranking of Alexanders creditors, the Bank of England claimed a preference, by virtue of that right; to which the Bank of Scotland and other creditors

Objected, That the conveyance was inept and ineffectual; *1mo*, Because it tended to constitute a general and undefined burden only upon the lands; and, *2do*, As being contrary to Act 1696. cap. 5. a security for debts not already owing, but to be contracted in future.

In support of the *first* objection, it was *argued*: Since the decision of the House of Lords on this point in 1734, it has ever been an established rule, that no indefinite or unknown incumbrance, no general burden, can be created on lands, so as to become a real lien upon them. Now, the security in question was not granted to guarantee any precise or specific debt already contracted, but, on the contrary, merely to guard against the uncertain result of a general credit given by the Bank of England, which might produce a debt, either inconsiderably small, or so great as to be almost without bounds. For its *maximum* can hardly be considered as limited by a sum so disproportioned to the value of the estate, as is that of L. 160,000. Nor, at any future period, could its amount appear from the public records. Such a security is a novelty in our law, and, as a precedent, would be of dangerous consequence. Any circulation of bills, as well as the particular operation of discounting, might be protected by a cover of this kind: A powerful engine in the hands of a mercantile creditor. If, before the infestment, he has really paid sums to the debtor, or discounted bills, to the extent mentioned in the security, he will have it in his power, at any subsequent period, to take in all such bills as he thinks proper to the same amount, and no inhibition, or other diligence, not even a posterior infestment, can stand in his way. In this manner, a bankrupt acting in collusion with the creditor who holds such security, may give a preference to any debts *they* please, by having them indorsed or transferred to that creditor.

With respect to the *second* objection, it was urged: Though, prior to the security, the Bank had actually advanced the whole L. 160,000, by the discounting of the bills, yet the security was not granted on account of those specific bills, but, as its tenour shows, for a progressive and continued series of discounting operations *per tractum futuri temporis*. The rules of the Bank did not even admit a permanent loan.

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This, by the way, is a proceeding of an usurious tendency, a real security for which, the law will no more sustain, than it would an heritable bond obliging the debtor to pay forehand interest every three months. If it could at all be supported, it would only be after repayment of all the extraordinary interests, discounts, and sums given in name of commission. It is a proceeding, too, which renders creditors liable to be deceived; for, upon having shewn to them any prior set of bills to the amount of the L. 160,000, retired and cancelled, they might readily be induced to believe, that an end had been put to the security.

But that which proves the validity of the objection is, that it was the bills, and not the disposition in security, which really constituted the ground of debt. Without the bills, this disposition could have no effect. On account of them, to use the words of the agreement, it was granted 'as a collateral security.' Now, from every succession of new bills, there arises a *novatio debiti*; for, with respect to bills, the *nomen debitoris* is inseparable from the written voucher. Two bills drawn for the same sum would be considered as vouchers of different debts; and both would be effectual to indorsees. Thus they differ from bonds of corroboration; in which the renewal or multiplication of the instrument of debt affects not the *nomen debitoris*; nor is it inconsistent with the preceding security; whereas, if a second bill be granted on the same account with the first, this is immediately to be cancelled. For the second constitutes a new debt, which extinguishes the former, liberates indorsees, and every other person concerned in it, and puts an end to all the diligence that has been done upon it.

If the Bank of England had raised inhibition or adjudication on the first set of bills granted in 1774, now no longer existing, would these diligences have availed in the present ranking? If manifestly not, are bills, in 1775, to be considered as the same with those in 1774, in order to give effect to a voluntary security granted by a bankrupt?

Again, suppose inhibition against Alexanders prior to the last set of bills, would it not have struck against them, notwithstanding their supposed connection with preceding sets? Were it not to have that effect, banking companies might often put inhibitions at defiance.

Nor is it enough that those proceedings may have arisen from the original contract. The statutory regulations are not to be so dispensed with.

It is to be only further observed, that the argument now stated is perfectly conformable to the judgment of the court, in the case of the annuitants of the York-Buildings Company, 30th June 1752; Fac. Coll. and Select. Decis.

Answered to the first objection: It is not, in any proper sense, a general burden, which is constituted by the real security in question; for, in the investment, its *maximum*, or utmost extent, is precisely and specifically ascertained. In no instance has the court found the character of *generality* relative to the amount of debt, where such was the case. Creditors or purchasers are thus sufficiently informed to guard against the greatest possible hazard. Accordingly, it was never doubted that

that a debt heritably secured would be effectual, though subject to a progressive diminution by payment; and yet, in that case, as well as in this, the records could only, with certainty, show the greatest possible amount of the debt, but by no means its actual extent, at any period. If, in the one instance, such information is sufficient, why is it not equally adequate in the other? Surely it can be of no consequence, whether the difference between the actual debt and the *maximum*, is produced by a scale of increase or of decrease. The same obvious principle, indeed, which governs both cases, also regulates various others; those, for example, of real securities, for relief of cautionary engagements, or for the jointures of wives, and that of real warrandice; in all of which instances, though the outmost possible hazard can be easily known, yet its actual extent, whether even it should at all exist, may be altogether uncertain.

Nor does this doctrine lead, as the objectors argue, to any thing unjust, or inexpedient. The case put by them on this head, which, by the bye, is, in several obvious respects, more indefinite and general than the present, can surely never prove, that, in the free disposal of one's money or estate, if likewise lawful and void of fraud, there is either public inexpediency or injustice; nor without absurdity can an operation be considered as fraudulent, which, like that in question, is fairly and openly announced to the world, and certified by the records.

Answered to the second objection: Instances of investments sustained in security of conditional or future debts, have been, as referring to the former objection, already given; and, with respect to the present one, they show, that the proper interpretation of the act 1696 is somewhat limited. But, in fact, the debt in question was truly constituted prior both to the disposition and to the investment. The source of this objection is the erroneous supposition, that the bills were inseparable from, or the essence of the *nomen debitoris*; whereas bills, in their own nature, are really nothing more than any other voucher, or evidence of an obligation. For the facility of negotiation, indeed, they are held, when in the possession of an onerous indorsee, as of unchallengeable veracity, and as such pass from hand to hand. In other words, it is thus presumed, that a bill expresses a true debt. But it would be most absurd to conceive, that, in consequence of being so expressed, a true debt must actually arise; and yet, if this be not supposed, the voucher and *nomen debitoris* will be no longer considered as inseparable.

Now, it is next to be remarked, that, prior to the investment, the whole sum of L. 160,000 was paid, and that, ever since, it has remained due. The debt then constituted still continues. It is true, it subsisted, according to the peculiar rules of the Bank, by repeated discounts, and renewal of bills. In this manner, however, nothing, it is evident, was changed, but the vouchers of the debt. Itself remained as much unextinguished as ever. The obligation was always the same; the evidence of it alone suffered any variation. Even though the whole sum had not been actually paid prior to the investment, that engagement which, by the original agreement, the Banking-company came under, would have formed such a debt as might have been secured;

cured ; because, as at any time they could have been compelled to fulfil it, so they would have been equally entitled to the stipulated guarantee against that event. Accordingly, it is common in practice to grant heritable securities for sums not yet actually paid.

One other illustration of this point shall be added. Instead of viewing the bills as evidences or vouchers of the debt previously constituted, they may perhaps be more properly considered as pledges or deposits, lodged with the creditors in additional security, like so many bags of money. In this respect, then, it is plain, that no change made upon the bills could, in the least degree, invalidate the debt itself. Nor does it seem much more difficult to perceive, that, as vouchers, they would have just as little effect. Hence the answer to the observations respecting various supposed cases of inhibitions is obviously this, that the bills not being the ground of debt, it is nothing, as to the present argument, that inhibitions founded on them would not avail.

The Lords ‘repelled the objections made to the real security on
‘ which the Bank of England claimed their preference in the rank-
‘ ing.’

Lord Ordinary, *Justice Clerk.*

A&T. Rae et Law.
Clerk, *Tait.*

Alt. L. Campbell.

S.

No. XLII.

March 1. 1781.

B A R B A R A C U T H B E R T S O N,

Against

ISAAC THOMSON, and JEAN YOUNG.

*Fiar. Disposition to a daughter in liferent, and to her children procreated
and to be procreated, in fee.*

ON the 16th January 1724, Peter Cassils executed a disposition of a house in Edinburgh, ‘To and in favour of Anne Cassils, his daughter, *in liferent*, during all the days of her lifetime, with the burden always of the aliment and education of the children of the marriage betwixt her and John Cuthbertson, during their respective pupillarities, *and to the children procreated, or to be procreated of the said marriage*, equally and proportionably amongst them, *in fee* ; and *failing any of them by decease, to the others surviving.*’

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The children of the marriage between Anne Caffils and John Cuthbertson were three ; Peter, Anne, and Barbara. Peter died in the year 1755, leaving several children. Anne died in the 1762, and left an only son, Isaac Thomson. Their mother, the liferentrix, survived them both, and died in the 1778.

Some years after the death of Peter Cuthbertson, his eldest son William was charged to enter heir to him, at the instance of William Polson, a creditor, who obtained an adjudication, comprehending, among other subjects, Peter's fee of the third part of the house above mentioned. Polson afterwards got a charter from the magistrates of Edinburgh, upon which he was infeft. He then purchased a voluntary conveyance from William Cuthbertson, of those subjects which he had adjudged, containing a renunciation of all right of redemption or reversion competent to the said William. And, a short time before his death, he settled upon his spouse Jean Young the liferent of the house in question.

Upon the death of Anne Caffils the liferentrix, Barbara Cuthbertson, her only surviving child, made up titles by a service, as heir of provision to her grandfather ; and, in that character, claimed right to the whole of the subject. Jean Young, Mr Polson's widow, claimed a third of the rent, in virtue of the rights above mentioned, derived from Peter Cuthbertson, and his son William. And the tenants having called them to dispute their interests in a multiple-poiding, appearance was made for Isaac Thomson, who also claimed a third, in right of his mother Anne Cuthbertson.

The question, therefore, came to be, at what period the destination of the fee by Peter Caffils took effect ; whether at his death, or at the death of his daughter, the liferentrix ? In the one case, the three grandchildren, Anne, Peter, and Barbara, having each of them right to a third, Anne's share descended to her son Isaac Thomson ; and Peter's was carried by Polson's adjudication, and the subsequent conveyance he obtained from William Cuthbertson. In the other case, Barbara, as *only surviving child*, had right to the whole.

Pleaded for Barbara Cuthbertson : It is a rule of law, that the fee of no subject can be *in pendent*. Upon this principle, whenever lands are disposed to a person in *liferent*, and to *his children in fee*, the parent is presumed to be the *fiar* ; and nothing is understood to be vested in the children but a *spes successionis*, which may be disappointed ; Kilker. 24th February 1741, Lillie *contra* Riddel ; 7th July 1761, Douglas *contra* Ainslie. In the present case, therefore, it was impossible that Peter and Anne Cuthbertsons could transmit any right whatever in the subject ; for there being nothing in the conception of the deed that limited their mother's right of fee, or rendered it *fiduciary*, she might have sold the whole, or she might have disposed it gratuitously.

But, supposing that the fee could have been in the children of Anne Caffils, it is plain, from the words of the disposition, that the granter did not mean to call them to the succession as *conditional institutes*, but as *proper substitutes* ; so that Barbara alone surviving the liferentrix,

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must

must have succeeded, in preference to the representatives of her brother and sister ; Stair, 13th July 1681, *Christie contra Christie*. She is not, however, under any necessity of carrying the argument so far ; because the fee never having been in Peter and Anne Cuthbertsons, but in their mother, who survived them, it fell to their sister Barbara, in the same way as if they had never existed.

At any rate, as Peter Cuthbertson died without making up any titles in his person, Mrs Polson, in virtue of her husband's adjudication, has no right to compete for the rents of the subject.

Answered for Young and Thomson : The cases *Lillie contra Ridde*, and *Douglas contra Ainslie*, related to a fee granted not to children already existing, but to children *nascituri*, where, to preserve the rule of law, that a fee cannot be *in pendent*, a constructive fee was presumed to be in the father. But here, there is no room for any such presumption. The children of Anne Cassils and John Cuthbertson were all of them actually existing at the date of their grandfather's settlement ; and the fee could no more be said to be *in pendent*, by being bestowed upon them directly, than by being presumptively vested in the person of the liferentrix. Accordingly, in all such cases, the fee is held to be in the children existing ; 27th March 1707, *Frazer contra Brown and Gordon*, Dict. vol. 1. p. 302. (Fiar.) And, in the latter case, the fee was found to belong to children *not existing till afterwards*, in preference to the creditors of their father the liferenter ; 25th February 1773, *Grays contra Wood*, Fac. Coll.

But, supposing the fee, by a strong perversion of the destination, to have been in the mother, though provided to the liferent only, and the children, to whom the fee was expressly disposed, to have had no right, except by succession to her, yet this hypothesis would not avail Barbara Cuthbertson ; because it is not to her, but to her nephew William, that the succession in that case must fall.

Neither is the second branch of her argument better founded : For it would be a most singular construction of the settlement, to suppose that Peter Cassils, providing the fee expressly to his grand-children, meant only to create a liferent to each of them, untransmissible by any manner of way, or for the most onerous cause, except by the last liver, in whom the whole fee was to center. The clause in question imports no more than a *conditional institution* of the grand-children to one another, which did not take effect, because the condition did not exist. All the three survived the granter ; and so Peter and Anne transmitted their respective shares to their representatives.

But, even considering it in the light of a *proper substitution*, the condition *si sine liberis decesserit*, was clearly implied ; and Barbara's right, as survivor, became limited by the existence of children of her brother and sister ; 21st November 1738, *Magistrates of Montrose contra Robertson*, Dict. vol. 1. p. 430. And this doctrine is so far supported by the case of *Christies* in July 1681, observed by Stair, that, as soon as the effect of the implied condition was properly stated, the court appointed it to be heard in presence.

As to the right of Jean Young, it stands both upon her husband's adjudication, and upon the voluntary conveyance of William Cuthbertson ;

bertson ; though the first alone would have been sufficient ; 14th December 1710, Smith *contra* Smith : Whereas Barbara's service as heir of provision to her grandfather could carry nothing, he being entirely divested of the subject by his own disposition ; Erskine, B. 3. tit. 8.

§ 75.

Replied for Barbara Cuthbertson : The condition *si sine liberis* is not applicable to the present case. Among the Romans, from whom we derive it, it took place only in settlements made by persons who had no lawful issue existing at the time ; and was founded on the natural presumption, that the granter would have preferred his own issue to strangers ; Erskine, B. 3. tit. 8. § 46. Where, therefore, all the substitutes stand nearer related to the granter, than those to whom it is now said to be transmitted ; and, where he has expressly substituted one grand-child to another ; there is no room for applying the condition *si sine liberis*, or for presuming that he did not mean to prefer his surviving grand-children to his great-grand-children.

With regard to the titles, Peter Cassils was never divested of the subject during his life ; for, though he disposed it to his daughter Anne and her children, he, at the same time, reserved his own liferent, and also a power and faculty to alter. He died, therefore, in the full right of the subject, and being the person last inest, Barbara's service as heir of provision to him was perfectly proper and regular.

Observed on the bench : The conception of the deed being to children *to be procreated*, the fee was clearly vested in their mother the liferentrix ; and no more than a *spes successionis*, contingent on the number of the children, was conveyed to them ; and, as the substitution necessarily implied the condition *si sine liberis*, those who had died before the liferentrix, transmitted their right to their children. The court thought the charge to William Cuthbertson ought to have been as heir to his grandmother ; and it was doubted, whether even his voluntary conveyance carried more than the maills and duties during his life. But, as he did not object, the judgment was,

- ‘ Find, That the fee of the subject in question was in Anne Cassils ;
- ‘ and that, after her death, the same descended to her daughter,
- ‘ Barbara, and to her grandson William Cuthbertson, in right of
- ‘ his father Peter, and to Isaac Thomson in right of his mother,
- ‘ Anne Cuthbertson, equally.’

Barbara reclaimed ; but her petition was refused without answers.

Lord Ordinary, *Alva*.

Act. *H. Erskine*.

Alt. *Nairne*.

Clerk, *Tait*.

L.

No.

No. XLIII.

March 6. 1781.

R O B E R T S C O T T,

Against

J O H N H A M I L T O N.

Member of parliament. Discrepancy in the descriptive and valent clauses of a retour.

MR SCOTT, in evidence of the old extent of the lands on which he claimed to be enrolled as a freeholder in the county of Ayr, produced a retour, in which these lands were contained among others.

The *cumulo valent* in the retour extended the whole to L. 7 : 6 : 8 ; but the descriptive values, when joined, amounted only to L. 5 : 6 : 8.

The Lords were of opinion, That this difference was too considerable to be imputed to an error in calculation ; and, on this account, refused to sustain the retour, as ascertaining the old extent of the lands belonging to the claimant.

Aff. George Ferguson.

Alt. James Boswell.

C.

No. XLIV.

E O D E M D I E.

J O H N H A M I L T O N,

Against

R O B E R T C A T H C A R T.

Member of parliament. Titles not exhibited to the meeting of freeholders admitted in the court of review.

IN the year 1703, Mr Cathcart of Carleton obtained a charter of resignation under the great seal, of certain lands ; and, in the same year, he disposed these lands and charter of resignation to Robert Cathcart of Genoch.

Upon

Upon Genoch's death, his son John Cathcart was served heir in general to him, thereby deriving right to the charter of resignation and disposition; and his infeftment upon the service, which was duly retoured, was recorded the 8th December 1738. Upon these rights, together with a retour dated 29th August 1677, for proving the old extent, he was admitted to the roll of electors for the county of Ayr.

At the Michaelmas meeting of the freeholders in that county in 1780, Robert Cathcart, son to John, claimed to be enrolled as apparent heir of his father, lately dead; and his claim, founded on the titles already recited, was unanimously sustained.

It was discovered that Mr Cathcart had not exhibited to the freeholders the disposition by Carleton to his grandfather. In a complaint, at the instance of Mr Hamilton, it was

Pleaded: By the act 16th Geo. II. it is provided, That no heir apparent shall be enrolled until his predecessor's titles are produced. The charter of resignation founded on is not in favour of the ancestor, but of Carleton. A disposition from Carleton, therefore, is absolutely necessary for connecting the charter in his favour, with the infeftment in favour of the predecessor. Without it the ancestor's rights are incomplete, and could neither afford a title of prescription, nor for being enrolled as a freeholder. The claimant, therefore, not having produced the disposition in favour of his ancestor, has not complied with the legal requisites; and the freeholders did wrong in admitting him to the roll.

It is not sufficient to elide this objection, that Mr Cathcart had this evident in his possession at the period of his enrolment. The freeholders did wrong in admitting the claimant contrary to the express prescription of the law; and although the court of review may receive new evidence in support of titles produced to the freeholders, it cannot judge of titles which, though mentioned in the claim, and essential to the qualification, were not exhibited at the enrolment. According to this doctrine, the court decided in the cases of Sir John Gordon against the freeholders of Cromarty, 24th February 1769, affirmed by the House of Peers; of Mr Edmonstone of Duntreath against freeholders of Dumbartonshire, 29th February 1780; and of Mr Moodie of Mellsetter against freeholders of Orkney, 10th February 1781.

Answered for Mr Cathcart: The disposition in question was in the possession of the claimant when he was enrolled, and could have been produced had it been called for. The same justice, which listens to an objection omitted at the enrolment, which was the proper season for making it, will afford the other party an opportunity of defending himself. It is therefore competent to the respondent to obviate the objection, by producing the disposition at the bar.

In the cases referred to, the objection had been moved at the enrolment, whereby the claimants had an opportunity of removing it, if they had been in a capacity to do so.

'The Lords repelled the objection, and dismissed the complaint.'

Alt. M'Laurin. J. Boswell.

Alt. Geo. Buchan-Hepburn.

X

C.

No.

No. XLVI.

March 7. 1781.

CHARLES DALRYMPLE and JAMES BREMNER,

Against

JAMES FARQUHAR GRAY.

Member of parliament.—The enrolment of a claimant by the freeholders in one character, sustained in the court of review in another.—Year and day.

AT the meeting for electing a member of parliament for the county of Ayr, held in October 1780, Mr Farquhar Gray claimed to be enrolled upon the following titles :

1mo, Instrument of feizin of the lands of Gillmillscroft, in favour of Alexander Farquhar deceased, father-in-law to the claimant, dated 20th March, and registered 20th April 1745, proceeding on a charter under the great seal in his favour.

2do, Retour of the general service of the claimant's wife, Jean Farquhar, as nearest lawful heir of tailzie to the said Alexander Farquhar, dated 19th February 1779.

3tio, Charter of resignation under the great seal, in favour of the said Jean Farquhar, of the lands of Gillmillscroft, dated 23d February 1779.

4to, Instrument of feizin following thereon, dated 28th April, and registered 6th June 1730.

Mr Farquhar Gray's claim, founded on his wife's infestment, was the first taken under the consideration of the meeting. Before it was discussed, some of his friends thinking it exceptionable, as his wife's feizin was registered about six months only before the election, advised him to withdraw it, and to demand an enrolment in virtue of his wife's apparency as heir to her father. He did so, and was admitted to the roll accordingly.

In a complaint against this enrolment, at the instance of Messrs Dalrymple and Bremner, it was

Pleaded: To entitle a person to be enrolled in the character of apparent heir, the predecessor's titles must be produced, by which is meant not the instrument of feizin alone, but the whole feudal investiture. In this case the production consisted of an instrument of feizin in favour of the predecessor, said to proceed on a charter which was not produced. The title of the claimant, therefore, was essentially defective, the enrolment, of course, unwarrantable, and the claimant fell to be expunged from the roll.

Answered

Answered for Mr Farquhar Gray: At a meeting for election, no previous claim is necessary. Upon the rights produced for the respondent, he was entitled to claim, *1mo*, On his wife's apparency; and, *2do*, upon the complete feudal title made up in her person.

Supposing the respondent's claim to be unsupported on the first ground, it is, however, clearly well founded on the second; for the only objection that can be suggested is, that Mrs Farquhar Gray's seizin was not recorded sooner than the 28th April 1780; from which it may be inferred, that, being within year and day of the meeting for election, the respondent ought not to have been admitted to the roll. But the obvious answer to this objection is, That when a husband claims to be enrolled in virtue of his wife's infeftment, it is not necessary that the same should be recorded a year before enrolment.

By the statute 1681, it is not required that the claimant's infeftment should be completed any given time before enrolment. So stood the law till the 12th of Queen Anne, when the practice of conveying estates in trust on the eve of an election for the purpose of creating nominal votes was become frequent. This statute proceeds on a recital, 'That, whereas of late several conveyances of estates have been made in trust, or redeemable for elusory sums, nowise adequate to the true value of the lands, on purpose to create and multiply votes in elections of members to serve in parliament for that part of Great Britain called Scotland, contrary to the true intent and meaning of the laws in that behalf;' to prevent these abuses it is enacted, 'That, from and after the determination of this present parliament, no conveyance, or right whatsoever, whereupon infeftment was not taken, and seizin registered, one year before the *teste* of the writs for calling a new parliament, shall, upon objection made on that behalf, entitle the person or persons so infeft, to vote, or to be elected at that election for any shire or stewartry in that part of Great Britain called Scotland; and in case any election happen during the continuance of a parliament, no conveyance or right whatsoever, whereupon infeftment is not taken one year before the date of the warrant for making out a new writ for such election, shall, upon objection made in that behalf, entitle the person or persons so infeft, to vote, or be elected at that election.'

As, by the same statute it was provided, that, to entitle a husband to vote in right of his wife, the wife must be an *heiress*, and have the *property* of the lands, it is inconceivable that the enactment requiring completion of the investiture, a year before enrolment, could apply to that case, unless it had been meant even to prevent persons from marrying heiresses, on purpose to multiply nominal votes. And all doubt on this head is removed by an express clause, declaring, 'That the right of apparent heirs, in voting at elections, and the right of husbands by virtue of their wives infeftments, be reserved to them as formerly; any thing in this act contained to the contrary notwithstanding.'

The only other statute, material to be observed, is that in the 16th of the late King, in which there is the following clause: 'That no purchaser or singular successor shall be enrolled, till he be publicly
' infeft,

‘ infest, and his feizin registered, or charter of confirmation be expedite, where confirmation is necessary, one year before the enrolment.’

The respondent’s wife is served heir general of tailzie to her father, which gives her right, not to the lands of Gillmillscroft alone, but to every subject descendible to heirs of that character. It is obvious, therefore, that statute has no relation to the present case.

Replied: Mr Farquhar Gray’s claim was founded solely on his wife’s right of apparenry. The judgment of the freeholders proceeded on that claim alone, the illegality of which is now admitted by Mr Farquhar Gray himself. Such being the case, it is incompetent for the court of review to judge, whether the claimant might have been justly enrolled, had his claim been founded on other grounds. The law requires that a claim should be exhibited to the freeholders, reciting the particular titles and character on which the enrolment is demanded. A claim either unwarranted by the titles, or unsuitable to the character of the claimant, is equal to none. The judgment of the court, therefore, sustaining the enrolment, would, in effect, declare, that a person producing titles to the freeholders, without any claim, is entitled to be enrolled.

It has been always understood, that a husband, claiming in right of his wife, was in no better situation than the wife herself would have been, could she exercise the privilege of voting in her own person.— Had Mr Farquhar Gray produced the same titles in his own right, no enrolment could have proceeded on them. In the character of apparent heir, the defect in his production is admitted; and, as having the feudal right of the lands vested in him, the objection of his not being infest a year before, must have been fatal to his enrolment.

It is needless to argue upon the statute 1681. The law, since that period, has suffered a total alteration; and no person, other than an apparent heir, can be enrolled, unless his infestment be registered a year before enrolment. As to the saving clause, founded on by Mr Farquhar Gray, as suspending the operation of the statute of the 12th of Queen Anne, in the case of husbands claiming in right of their wives’ infestment, it cannot, in sound construction, have that meaning. Apparent heirs are contained in the same exception. As their right of being enrolled required no infestment in their persons, the legislature could not think it necessary to guard them against a law which related to a requisite at no time essential to their qualification. The only clause applicable to both enacts, ‘ That no person or persons who have not been enrolled, and voted at former elections, shall, upon any pretence whatsoever, be enrolled or admitted to vote at any election, except he or they first produce a sufficient right or title to qualify him or them to vote at that election, to the satisfaction of the freeholders formerly enrolled, or the majority of them present.’ From this part of the statute, the saving clause meant to except husbands and apparent heirs.

Observed on the bench: There is no necessity for lodging a claim for enrolment previously to a meeting for election. A person, therefore, added to the roll on that occasion, may support his enrolment in the court

court of review, by showing that his rights laid before the freeholders entitled him to be enrolled, though in a character different from that in which the freeholders sustained the claim. The statutes requiring the completion of the freeholders' investiture a year before enrolment, cannot, in sound construction, extend to the case of husbands claiming in right of their wives' infestments.

' The Lords dismissed the complaint.'

A&T. *Geo. Ferguson.*

Alt. *Rolland.*

C.

No. XLVII.

March 7. 1781.

WILLIAM FULLERTON and DAVID KENNEDY,

Against

The MAGISTRATES of AYR.

Prisoner.

THE following circumstances were found sufficient to subject the magistrates of a borough to the payment of a debt due by a prisoner, in terms of the act of federunt 14th June 1671, entitled, ' An act against the magistrates of boroughs for letting prisoners for debts go out of the tolbooth.'

Instead of complying with the act, by requiring the attestation of a physician upon oath, bearing that the debtor actually laboured under a disease, attended with deadly symptoms, they had dismissed the debtor, upon the physician's declaring, *upon soul and conscience*, that the debtor's continuance in confinement might, by reason of his valetudinary state of health, prove fatal to his life; and, instead of confining the debtor in a house within the borough, and remanding him to prison upon his recovery, they had allowed him to go through the country for the space of five months, in the exercise of his profession as a country surgeon.

It may likewise be remarked, that the magistrates had accepted a bond from the debtor's friends, securing them against the consequences of their procedure.

Lord Ordinary, *Hailes.*

A&T. *Robertson.*

Alt. *Crosbie.*

C.

Y

No.

No. XLVIII.

E O D E M D I E.

L I E U T E N A N T - C O L O N E L F E R R I E R,

Against

R O B E R T G R A H A M.

Member of parliament.—Discrepancy in the descriptive and valent clauses of a retour.

COLONEL FERRIER claimed to be added to the roll of freeholders in the county of Ayr, and, for instructing the old extent of his lands, produced the retour of Sir William Cunningham of Cunningham-head, as heir to his father Sir William Cunningham, dated 12th May 1641.

This retour bore, that the deceased Sir William Cunningham died vest and seised ‘in tota et integra tenendria de Woodheid, comprehend. in se particulares terras, annuum redditum, aliaque respective subscripta, viz. totas et integras quatuor mercat. terrarum de Middleton, quatuor mercat. sex solidat. et octo denariat. de Caprinstante, (the lands claimed on) viginti solidat. terrarum de Dreghorn, viginti duas solidatas de Warric, sex solidat. et octo denariat. de Drumgreislaw, et unam mercatam terræ de Woodheid, cum pertinent. unum annuum redditum tertiæ partis unius libræ piperis annuatim levand. de terris de Bartonholm, quatuor mercatis terrarum de Warrickhill, omnes antiqui extentus jacent. infra balliatum de Cunninghame, et comitat. de Ayr.’ The valent clause was in these words: ‘Et quod tota et integra dicta tenendria de Woodheid, comprehend. in se particulares villas terras, annuum redditum, aliaque respective supra scripta, viz. quod dictæ quatuor mercat. terrarum de Middleton, quatuor mercat. sex solidat, et octo denariat, terrarum de Caprinstante, viginti solidat. terrarum de Dreghorn, viginti duas solidat. terrarum de Warric. sex solidat. et octo denariat. terrarum de Drumgreislaw, una mercat. terrarum de Woodhead, cum pertinent. et prædict. quatuor mercat terrarum de Warrichill, nunc valent per annum sexaginta sex libris duodecim solidis monetæ prædictæ, et valuerunt tempore pacis undecim libris et duobus solidis monetæ prædictæ, et quod dictus annuus redditus dictæ tertiæ partis unius libræ piperis nunc valet per annum tertiam partem unius libræ piperis, et tantum valuit tempore pacis.’

To

To this retour it was objected by Mr Graham, that the descriptive values exceeded those in the *valent* by seven merks and eight pence.

Answered for Colonel Ferrier : It is evident, from the repetition of the values of each particular tenement in the *valent* clause, corresponding precisely with the descriptions, that the variation pointed out by the objector has originated solely from a blunder in summing up the extents of the different tenements.

‘ The Lords repelled the objection.’

A&A. J. Boswell.

Alt. G. Ferguson.

C.

No. XLIX.

E O D E M D I E.

J O H N R U S S E L,

Against

W I L L I A M F E R G U S O N.

*Member of parliament.—Disposition containing procuratory and precept.
Year and day.*

MR FERGUSON stood upon the roll of freeholders in the county of Ayr, as infeft in the lands of Auchinsoul. In the year 1766 he granted a disposition of these lands to his son, containing procuratory and precept, and the son took infeftment on the precept.

In the month of April 1780, Mr Ferguson, for the purpose of preserving his freehold qualification, obtained from his son an obligation ‘ not to execute the procuratory, nor take any step for divesting him of ‘ the superiority of the lands during his life.’ And this obligation was immediately recorded in the register of renunciations and reversions.

At the meeting for election taking place six months after the date of this obligation, an objection was stated to Mr Ferguson’s title, that, by granting the disposition of his estate, his right therein became defeasible, and of course ceased to entitle him to the privileges of an elector ; and that the obligation from his son, not having been perfected year and day, was ineffectual to restore him.

This challenge, which was over-ruled by the freeholders, was brought under review of the court of session, when it was

Pleaded

Pleaded for Mr Ferguson : Freeholders cannot expunge a person from the roll, on account of an alteration of circumstances, where the title on which he was admitted cannot be defeated by such alteration. The amount of the present objection is, that it was in the power of a third party, at one period, to have defeated the respondent's freehold qualification.

The requisite of year and day, introduced by the 12th of Queen Anne, and continued by subsequent statutes, was calculated to prevent the admission of nominal and fictitious voters, reared up on the eve of an election, not to afford a captious and unnecessary challenge against persons already enrolled.

Had Mr Ferguson been divested of the superiority, it might have been contended, that the same formalities were necessary as in a new acquisition. But he has at every period been superior of the lands ; and no deed by his son, nor diligence of his creditors, can denude him.

‘ The Lords repelled the objection, and dismissed the complaint.’

Act. W. Baillie.

Alt. J. Boswell.

C.

No. L.

E O D E M D I E.

ROBERT MUIR and CHARLES DALRYMPLE,

Against

GILBERT M'ADAM.

Member of parliament.—Trust-right.

AT the meeting for electing a member of parliament for the county of Ayr, in 1780, it was *objected*, by a freeholder, to the title of Mr M'Adam of Merkland, then standing upon the roll, That he had divested himself of the lands on which he was enrolled, by a trust-deed, containing procuratory and precept, in favour of certain gentlemen, for behoof of his creditors. By doing so, his right became precarious and extinguishable at the will of another ; and, consequently, ceased to entitle him to a freehold qualification.

This challenge was brought before the Court of Session.

Pleaded for Mr M'Adam : A trust-conveyance does not absolutely divest the granter, although infestment has followed thereon. At any time before sale of the subjects, he may redeem, by payment of the debts

debts secured by the trust, in the same manner as a debtor whose lands are adjudged ; and his right is completely restored, by renunciation of the trustees, and without new investment.

In this case no investment has followed on the trust-right ; neither was there any evidence, when the objection was made, that either the trustees or creditors had accepted thereof. It was, therefore, no more than a mandate to sell, which no person ever conceived to be fatal to a qualification.

2do, Mr M^r Adam's right to vote is ascertained by the statute 1681, cap. 21. by which it is provided, ' That no person invest for relief or ' payment of sums, shall vote, but the granters of the said rights.'

For the objectors, *pleaded* : It has been decided in numberless instances, that a disposition with procuratory and precept, did incapacitate the granter from voting ; and there is no distinction in law arising from the purposes of such grants.

If the trustees had executed the procuratory, or obtained confirmation of the investment taken on the precept, they would have become the crown's vassals, and the truster's right would have resolved into a reversion, which was personal, and would be taken up by his heir, by general service. Nothing prevents the trustees from taking these steps at any time.

2do, In rights for relief, or security of sums of money, although the incumbrance may render the property useless, or of little value to the proprietor, the radical right still remains in him. In trust-dispositions, the granter's right may, in a moment, be totally annihilated ; and, in the present instance, it is already entirely dissolved, the trustees having sold the subjects at a price inadequate to the payment of the truster's debt.

The Lords ' sustained the objection, and ordered the respondent to ' be expunged from the roll.'

Act. George Ferguson.

Alt. James Boswell.

C.

Z

No.

No. LI.

March 9. 1781.

B L A I K I E,

Against

R B E R T S O N.

Bankrupt.

IT has been found, that a voluntary disposition for a price instantly paid, and not for anterior debts, fell not under the statutes 1621 and 1696: In like manner, that voluntary securities, granted for money instantly received, were not affected by these statutes; Erskine, large Instit. B. 4. tit. 1. § 43. In this case, it appeared from a proof, that the sums for which an heritable security was granted by the bankrupt, had been advanced by a favourite creditor, through an interposed person, in order to prefer that creditor, by making payment to him of the money so advanced: The transaction being thus evidently calculated to *elude* the statutes,

The Lords ‘ reduced the security.’

Ordinary, Lord Braxfield.

Aēt. Hay Campbell, Craig.

Alt. MacLaurin, Abercrombie.

C.

No. LII.

E O D E M D I E.

Sir J A M E S G R A N T and others,

Against

The D U K E of G O R D O N.

Regalia.—Right of floating timber in the river Spey.—Cruiue fishing.

THE Duke of Gordon’s right to a cruiue fishing in the river Spey, was brought under challenge by the proprietors of salmon-fishings in that river, as against the public law, and destructive of the salmon-fishing. They were unsuccessful in this challenge; and the Duke’s

Duke's right was ascertained by the judgment of the Court of Session, upon a remit from the House of Peers, in the year 1777.

In the year 1778, the pursuers, as proprietors of lands adjacent to the river Spey, brought a process against the Duke, concluding to have it found, ' That they had a right, at all times, to send floats of timber down the river, and to the navigation thereof, in every way of which it was capable, and to have every obstruction to this right removed; and that the Duke of Gordon should be obliged to remove all dikes, braes, and other bulwarks impeding the navigation, and should be prohibited from erecting such for the future.'

The object of this action was, the demolition of the cruive dikes, in which, it was said, great alterations had been lately made, very detrimental to the navigation. Formerly, a passage was left at one side, which allowed the currochs or small boats used by the Highlanders, to pass. The dikes were composed of loose smooth stones, which gave way to the least force; so that the floats met with little or no obstruction. Now a solid permanent dike was made, reaching from bank to bank, which rendered the passage very inconvenient and dangerous.

This process came before Lord Gardenstone, Ordinary, who reported the question to the Lords; and the Duke of Gordon having consented that the pursuers should have right to float timber down the river, from the 26th of August, to the 15th of March yearly, the court gave a judgment in terms of this consent, 26th March 1779. Against this deliverance the pursuers reclaimed, and

Pleaded: The Spey flows perpetually; it is navigated by rafts; and the inhabitants of the adjacent country have, for ages, made use of it for conveying downwards to the sea, their timber and other commodities. It is, therefore, a public and navigable river; *L. 1. p. 14. De Flum.*; Stair, 29th June 1593, Leslie of Creik.

With respect to such, the Roman Prætor provided, ' ne quid in flumine publico ripave ejus immittas, qua statio iterve navigio deterior fiat, *L. 1. § 14. 15. de Fluminibus.* Deterior statio itemque iter navigio fieri videtur, si derivetur aqua ut exiguior facta quo minus sit navigabilis, vel si dilatetur, ut diffusa brevem aquam faciat, vel si quid aliud fiat, quod navigationem incommodet, difficiliorem faciat, vel prorsus impedit, interdicto locus erit; *Ibid. § 14. 15.*

By the feudal law, the principles of which are adopted in Scotland, these rights, which were deemed public by the Roman law, are vested in the person of the King, not as a patrimonial interest and alienable by him, but as a trust for the good of the community. Such are public rivers and highways. With respect to the latter, it is indisputable, that the King cannot erect edifices on these, nor throw any obstruction in the way of passengers. And, in the same manner, with regard to rivers, Craig lays it down, *L. 1. Dieg. 16. p. 11.* ' Flumina navigabilia ad principem pertinent, licet jus navigandi ad privatos, ita ut nemo ex publico flumine aquam ducere possit ad privatam molam sine principis licentia, imo ne cum principis licentia, si usus publicus impediatur.'

The

The King, therefore, cannot bestow on the Duke of Gordon a right of shutting up the navigation of the river; neither can he, by a grant of cruive or other fishing, indirectly incommode the public right; and it was accordingly so found in the case of Sir Ludovic Grant against Sir Robert Gordon, February 19. 1761.

Answered for the Duke: The doctrine of the Roman law in this matter is inconsistent in itself, inapplicable to the present case, and repugnant to natural reason, and the practice of modern nations.

In one place it says, that the sea and public rivers, and the right of fishing therein, are incapable of appropriation, *L. 13. De Injuriis*. In another it admits, that an exclusive right of fishing in the sea and public rivers may be acquired by long possession, *L. 7. De diversis temporal. præscrip. L. 14. De Injuriis*.

The Roman law relates only to rivers which are capable of navigation and passage up and down, with vessels of burden, at all times and seasons, *L. 1. p. 5. De Flum.* The Spey is only capable of transporting floats of timber downwards from the Highlands to the sea, when swelled beyond its ordinary size, by a high flood. And no vessel, even of the meanest size, can be navigated upward upon the river, beyond the influence of the tide.

No reason whatever can be given why water, as well as land, should not be the subject of property, so far as its nature will permit. Modern nations, therefore, have uniformly exploded the idea of the sea and rivers being common; *Novell. Leon. 56. Selden, Mare Clausum, c. 15.* In particular, the law of this, and every country where the feudal system prevails, has transferred to the Sovereign these subjects, together with all others, which, by the Roman law, were called *Public*. They are held as his property, and are part of the Regalia; *Feud. lib. 2. tit. 56. Craig, lib. 2. dieg. 16.* Thus wreck, fishings in the sea, whether of salmon, or oysters, muscles, &c.; thus, the right of navigation in the sea, and that of ports and harbours, belong to the crown. And these rights, with the powers of exacting certain tolls and duties, it may either retain or transfer.

The Duke's right of cruive fishing was bestowed on his ancestors for honourable services. It has been recognised by the supreme courts of law. He is entitled to use it in the way most beneficial to himself, and cannot be prohibited from so doing even on account of the public good, without the interposition of parliament, and a due compensation made to him. Still less can his right be limited at the suit of these pursuers, who have no grants of navigation from the crown, and, of course, have no title to challenge the erection of the cruive dikes, as detrimental to the navigation.

The court, in giving their opinions, did not seem to regard the distinction betwixt public, or navigable, and private rivers. They considered a river, by which the produce of the country could be transported to the sea, to be a public benefit, entrusted to the King, as *pater patriæ*, for the behoof of his subjects in general, which could neither be given away nor abridged by him; and that this transportation, as the chief and primary use of the river, if incompatible with the cruive fishing, would prevail over it. They were, at the same time, of opinion, that

that these rights were not incompatible, if not emulously used, and, therefore, proceeded to fix certain regulations, according to which they were to be exercised.

By an interlocutor, dated 18th January 1781, they found, ‘ That the Duke of Gordon has a right of cruive fishing in the river Spey ; but that Sir James Grant, and the other pursuers, superior heritors on the Spey, have a right and title to pass with floats and rafts down the said river to the sea, from the 26th of August to the 15th of May ; and that, from the 26th of August to the end of March, they are entitled to the exercise of the said right of floating indiscriminately, without any restriction or limitation ; but that, in the exercise of that right, from the last day of March, to the 15th of May, the persons employed in the floating must give notice to the tacksmen of the Duke’s cruive-fishing, or their manager, personally, or at the wauk-mill of Fochabers, now called the fishing quarters, between sun rising and sun setting, and that at least four hours before the floats are to pass, that the Duke’s fishers, or others concerned in the cruives may make a passage for the floats or rafts passing the cruive dikes ; and, failing their opening a passage to the floats or rafts, within four hours of such notice, allow the persons attending the floats to open a passage for themselves in the cruive dike, and to pass freely, and without interruption.’

And, upon a petition from the Duke of Gordon, advised with answers, replies and duplies, they, of this date, found, ‘ that the superior heritors are only to float from sunrising to sun setting. Also that they are to pass the cruive dike *seriatim*, at the place pointed out to them by the Duke’s fishers, who are always making the said opening, so as to allow the floats to pass freely and conveniently.’

Aff. *Advocatus, Ilay Campbell et James Grant.*

Alt. *MacLaurin et alii.*

C.

No. LIII.

June 13. 1781.

J E A N B E L L,

Against

The MAGISTRATES of LOCHMABEN.

Prisoner.—Magistrates liable, if they do not imprison debtors as soon as delivered to them.

LETTERS of caption contain the following clause in the charge for incarcerating denounced debtors: ‘ And, if need be, that ye make steiked and lock-fast gates, doors, and houses, open and patent, and use our keys for that effect, *within three days* after they
A a ‘ are

‘ are charged by you thereto, under the pain of rebellion, and putting
 ‘ of them to the horn,’ &c. Two debtors were presented to the Magistrates of Lochmaben, on Tuesday, the 25th March 1779, but were left at liberty till Saturday, the 27th. The Magistrates were pursued by the creditor, for payment of the debt, and pleaded the above clause in their defence, as giving them a discretionary power of incarcerating at any time within the *three days*.

Upon advising informations, the Lords ‘ repelled the defences, discerned against the Magistrates for payment of the debt, and
 ‘ found them liable in expences.’

A reclaiming petition was refused unanimously.

Lord Ordinary, *Westhall*.

Ast. Ro. *Dalzell*.

Alt. *Ilay Campbell et Geo. Currie*.

D.

No. LIV.

E O D E M D I E.

*JAMES BUTCHART and others, owners of the ship
 Owner's Good Will of Aberbrothock,*

Against

*ALEXANDER MUDIE and JOHN RENNY,
 Trustees for the Creditors of the deceased Charles Kenny, master of said
 ship.*

*Prescription.—Act 1579, cap. 83. does not apply to accompts between
 the master of a ship and its owners.*

CHARLES KENNY, master of the ship called *Owner's Good Will*, being shipwrecked on the coast of Norway, in 1773, he himself and all his papers were lost. Trustees were appointed by his creditors; and the pursuers claimed to be ranked upon his funds, for their share of the freights earned by the ship, from April 1768, the date of their last clearance.

The triennial prescription, established by act 1579, was pleaded, *inter alia*, by the defenders, and the Lord Ordinary sustained it as a good defence; but, upon a reclaiming petition, the Lords remitted the cause to the Ordinary; and the same having been again brought before them by report, they

‘ Repelled the defence of prescription.’

A reclaiming

A reclaiming petition was refused without answers.

The court considered this as of the nature of an action against a factor, or *negotiorum gestor*, which could only be cut off by the long prescription.

Lord Ordinary, Justice Clerk.

Aff. John Ramsay.

Alt. W. Nairne.

D.

No. LV.

June 14. 1781.

RICHARD WADDELL,

Against

HERITORS and KIRK-SESSION of Hutton.

Poor.—Three year's residence entitles to an aliment.

BY a decision, 7th March 1767, Baxter against the parishes of Crailing and Roxburgh, the Lords ' found, that Baxter was entitled to be maintained by the parish of Roxburgh, as the parish where he resided during the immediate three years preceding his application for charity.

In the present case, which was a suspension of a judgment pronounced by the sheriff of Berwickshire, the Court considered the law as finally settled by the above decision; and, therefore, the three years' residence being proved, they would not listen to any arguments from the birth-place being known, nor to some other pretty strong circumstances urged for the suspenders; but

' Found the letters orderly proceeded, and the charger entitled to ' expences.'

Lord Covington, Reporter.

Aff. W. B. McLeod.

Alt. G. B. Hepburn.

D.

No.

No. LVI.

June 14. 1781.

CATHARINE GERRAN and her Husband,

Against

JOHN ALEXANDER of M^r Kilston.*Fiar absolute and limited.*

A LAST will was expressed in the following manner: ' I leave
 ' to Catharine Gerran, spouse to James M^rGhie merchant in
 ' Stranraer, the sum of L. 300 Sterling in liferent alimentary, and to
 ' be divided by her among her children at any time before her death;
 ' and, failing of her dividing the above sum, it is to be divided by the
 heirs and representatives of the said John Alexander, the testator, as
 ' they shall think proper.'

It became a question upon this clause, how far the mother could affect the legacy? and ' the Lords found unanimously that she had only
 ' a right of liferent.'

The Lord reporter observed, that, by many decisions, it had been found that the fee was really in the parents, though the destination bore only in liferent to them, and in fee to their children; but that this was not *ex necessitate*, as had sometimes been supposed, lest the fee should be *in pendente*. It was upon the presumed will of the granter, who only meant a *spes successionis* to be in the children; and, therefore, whenever there appeared to be intended a right of property in the children, the parents' right was either limited to a mere liferent, or considered as a *trust-fee*, which could be defeated.

Lord Braxfield, Reporter.

Act. —.

Alt. James Boswell.

D.

No.

No. LVII.

June 14. 1781.

D A V I D G R E I G, proprietor of the mill of Milnathort, and
his Tacksman,

Against

R O B E R T R E I D, and others.

Thirlage.—Use and wont may make grindable grains infer the same as grana crescentia.

IN this case, the charter and feu-contract, by which the pursuer acquired right to the mill, bore the restriction of *all grindable grains*, which, from the unfavourable nature of thirlages, is interpreted to mean only such grains as the tenant has occasion to grind; but it was proven that the practice of the parties beyond the years of prescription had understood it to be the same as an restriction of *grana crescentia*. And the Lords, upon this use and wont, found ‘all the oats thirled, ‘seed and horse corn excepted.’

Lord Braxfield, Reporter.

Act. John McLaurin.

Alt. —.

Menzies, Clerk.

D.

No. LVIII.

June 15. 1781.

D A V I D T O D, and others,

Against

The MAGISTRATES and TOWN-COUNCIL of St Andrews.

Borough Royal.—Magistrates have no power of imposing taxes.

THE magistrates of St Andrews had imposed, under the denomination of a causeway mail, first a halfpenny, and then a penny on each cart load of dung, sold to, or carried off by, strangers, from any inhabitant of the town. Several of the farmers in the neighbour-

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hood,

hood, with some of the inhabitants of the town, brought an action of declarator, ' to have it found and declared, that the magistrates and ' town-council had no right or title to impose new burdens, taxes, duties, or customs, either upon the inhabitants of the city or on the ' lieges in general, who may have occasion to resort to the city, with ' their horses, carts, or other carriages for dung, or any other materials for the purposes of agriculture, or otherwise, not particularly ' specified in their rights and charters, and occupied as such past the ' years of prescription,' &c.

The Lords unanimously decerned in the declarator, and found the defenders liable in expences.

Lord Justice Clerk, Reporter.

Adv. H. Erskine.

Adv. Alex. Ferguson.

D.

No. LIX.

June 15. 1781.

Mr JOHN ORR Advocate, Petitioner.

Advocate.

UPON the application of an advocate to be admitted notary public, The Lord's doubted how far the two offices could be or ought to be in one person. But the Dean and Faculty of Advocates being consulted, there were found many precedents; particularly Lord Haddington, who was a judge in the court, had been a notary public; and Mr Joseph Williamson was one at present; Mr Williamson is one of the city-clerks of Edinburgh, and the petitioner had a view to be city-clerk of Glasgow.

D.

No. LX.

June 15. 1781.

Doctor JAMES HAMILTON Physician,

Against

MARGARET and BARBARA GIBSONS.

Presumption.—Physicians' fees not always presumed paid.

IT is presumed in law, that physicians' fees, like all honoraries, are instantly paid without receipt, and, therefore, action is not competent for the payment of them, against the representatives of a deceased patient.

tient. The Lords, however, found, that particular circumstances may make an exception; and, in the present case, *inter alia*, repelled the defence founded upon this general rule.

The attendance for which the fees in this case were due, was not during the last illness; for, as to that, the point has been formerly decided; Dictionary of decisions, vol. 2. p. 140.

Lord Elliot, Ordinary.

Act. N. Ferguson.

Alt. Elphinston.

D.

No. LXI.

June 20. 1781.

J O H N T H O M S O N Merchant in Leith,

Against

G E O R G E B U C H A N A N, and others, underwriters in Glasgow.

Insurance.—Concealment of risk vacates the policy.

IN summer 1778, the pursuer had freighted a ship with a cargo to Gibraltar, from which it was to proceed to Malaga, and then with a new cargo to return home to Leith.

The master of the ship, on his arrival at Gibraltar, wrote to his owner the following letter, dated 28th September 1778. ‘ Sir, This is to acquaint you of my arrival here yesterday, after a long hard passage; and to acquaint you that *there is as much danger going from here to Malaga, as coming from England here.* I hear that the merchants at Malaga *wont ship any goods on board English ships, before they hear of a convoy to take them from there.* I am going to write Mr Ferry to-morrow by post, to hear what he thinks of it; for there is a great number of ships at Malaga that is chartered, and *the merchants wont ship aboard of them.* They are shipping on board of Spanish ships for London.’

After receiving this letter, the pursuer got the ship insured by the defenders, to the extent of L. 600, at the rate of 25 guineas *per cent.* and subjoined to the policy was a note, in these words: ‘ The last advice from Gibraltar was, the 28th September 1778; and the vessel arrived only the day before, and had a cargo to discharge. If said ship sails with convoy from Malaga or Gibraltar, bound for England, and arrives safe, L. 5 *per cent.* shall be returned.’ But the letter itself was neither communicated to the underwriters, nor put into the broker’s hands.

The ship was taken on the very day it sailed from Gibraltar; and intelligence of the capture was received on the very morning after the policy was underwritten.

Action

Action for payment of the insurance-money was brought before the Court of Admiralty : And the chief defence pleaded by the insurers was, that the policy was vacated by the concealment of the letter of advice from Gibraltar. The Judge of the Admiralty repelled the defence ; but the cause being carried to the Court of Session by suspension,

The Lords ‘ suspended the letters, sustained the defences, and affirmed the verdict.’

The same general arguments on both sides were pleaded in this case, as in the case, *Stewart contra Morison*, decided 19th January 1779 ; (collected by Mr Ogilvie) and the Court considered the rule laid down in that decision as established law, viz. ‘ That the person who applies for insurance of a ship or cargo in foreign parts, is not bound to produce all his letters of intelligence concerning the voyage or adventure ; yet he is bound, fully and fairly, to communicate every material circumstance of his intelligence, from which any probability of hazard may arise.’

Lord Justice Clerk, Reporter. A.A. Hay Campbell. Adv. Jo. M'Laurin. Clerk, M'Kenzie.

D.

No. LXII.

June 29. 1781.

D U K E of A R G Y L E,

Against

Sir A L L A N M' L E A N.

Proving the tenor.—Casus amissionis.

THE family of Argyle had, for more than a century, been in possession of considerable estates formerly belonging to the M'Leans of Dowart, when, in the 1771, Sir Allan M'Lean made an attempt to recover the antient patrimony of his house, by a process of reduction and improbation, raised in the name of M'Lean of Drimnin, as his trustee.

In this process, the Duke of Argyle produced writs, and proved possession sufficient to exclude the pursuer's title, as to most of the estates in question ; but was found obliged to satisfy the production, as to certain parts of the lands of Brolofs, then possessed by Sir Allan, under lease from his Grace.

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In the year 1634, the representatives of the two families entered into a contract, whereby Sir Lauchlan M'Lean became bound to resign, in favour of Lord Lorn, certain estates; and, in particular, the lands of Brolofs and the twenty-four merk five shilling-land of Arrois, for a feu-right to be granted him by his Lordship. In the year 1637, Lord Lorn obtained a charter from the crown, containing a *de novo-damus*, by which the whole lands specified in the contract, were erected into a barony, to be called, 'the Barony of Arrois.' In the year 1642, his Lordship, then Marquis of Argyle, granted Sir Lauchlan a feu-charter in terms of the above agreement; but, in the 1672, his son Archibald, Earl of Argyle, found it necessary (as was alledged) to raise an action of declarator of irritancy of said feu-right, *ob non solutum canonem*, in which he obtained decret. This decret, however, was amissing, and could not be discovered upon record. The Duke of Argyle, therefore, in order to complete the titles which were now called for, brought an action for proving the tenour of this decret; and the matter being heard in presence, it was

Pleaded for the pursuer: The situation of the family of Argyle, about a century ago, is well known. In the 1681, the Earl of Argyle was tried for his explanation of the test imposed that year; was found guilty, imprisoned, and forfeited. Having made his escape, he lived abroad for some years; but was afterwards taken, and beheaded at Edinburgh, in 1685. In the mean time, his papers had been carried off and concealed by some of his friends; but being discovered, as Lord Fountainhall observes, Vol. I. p. 504. were afterwards removed to Edinburgh, by order of the privy council. It is probable, therefore, that the decree in question was lost about this period, and in consequence of some of these removals.

Nor is it at all improbable, that this decree should not be found upon record; because, till the 1738, when an act of sederunt put matters upon a proper footing, it appears that the records were kept in a very slovenly and imperfect manner.

But the real existence of the decree in question is proved by various documents. *1mo*, The minute-book of the court of session bears an entry of such a decree, of date 13th November 1672. *2do*, An old inventory-book belonging to the family of Argyle, mentions a decree of precisely the same date, and describes it as being a *decree of reduction* of M'Lean of Dowart's rights to the *lands and barony of Arrois and Brolofs*, for *not payment of the feu-duty*. *3tio*, In a process of removing from the lands and barony of *Arrois and Brolofs*, in the year 1673, this decree *ob non solutum canonem* is specially founded on; as it is, *4to*, In another process of removing in the 1674, and also in the executorial letters which followed at the Earl's instance. From these documents it is clear, that such a decree as that in question once existed; and the circumstances above mentioned seem sufficiently to account for the manner in which it came to be lost.

Answered: The production already made shows that the title-deeds of the family of Argyle are in the best order; and, it is rather extraordinary that this *supposed* decree only should be amissing. But the proving the tenour of a decree of the court of session, is al-

together *new*. The warrants of every such decree must necessarily be among the public records; and, where these do not appear, the legal presumption is that they never existed. It is even doubted, whether the present action is *competent*; for, when the records of the commission of teinds were destroyed by an accidental fire, it required a special act of parliament to enable the court to proceed in establishing the tenour of the lost deeds. At any rate, the pursuer has here proved no special *casus amissionis*; and, in the late case of Campbell of Shawfield, *that* was found to be an essential requisite.

Observed on the Bench: It would be dangerous to allow the tenour of bills and other simple obligations to be proved, unless where the *casus amissionis* is very special, because they are usually given up upon payment, and no separate discharge is granted. This was the case as to Mr Campbell of Shawfield. But here, where the deed was of a permanent nature, there is no such danger; and it is unnecessary to prove a special *casus amissionis*, that circumstance being presumable from its non-appearance.

As therefore it was evident, that some such decree as that in question had once existed, the court ‘allowed the action to proceed.’

Act. *Hay Campbell et Crosbie.*

Alt. *McLaurin.*

L.

No. LXIII.

July 3. 1781.

PATRICK HOME,

Against

ELIZABETH and JEAN WOOD.

Jurisdiction of the court of session.—Effect of a decree of exception in terms of the act 5th Geo. I. chap. 22.

UPON the attainder of George Home of Wedderburn for his accession to the rebellion 1715, Robert Wood, portioner of Whitesome, one of his vassals, applied to exchequer, in terms of the 1st Geo. I. chap. 50. commonly called the Clan-act, and obtained a charter from the crown; which right was afterwards, 10th September 1719, confirmed by a decree of exception, in terms of the act 5th Geo. I. chap. 22.

Under this last statute, a claim to the whole estate of Wedderburn was likewise entered by Ninian Home, who, in virtue of certain adjudications,

tions, &c. subsisting in his person, previously to the forfeiture, was found, 16th September 1719, to have right to the property of the said lands and others mentioned in the exceptions. And it was also found, ' that the said George Home had no right or title to the said lands and others aforesaid, upon the 24th day of June 1715 years, (the retrospective date of the statute) nor at any time since; and that the public has no right nor title to the said lands and others, by the attainder of the said George Home.'

In the 1729, Ninian Home expedite a charter of the estate; and, a few years afterwards, disposed it to the heir of the family, who, in the 1746, called Wood and some others of the vassals in a process of reduction, declarator, and non-entry. This process, however, was never brought to a conclusion, till Mr Patrick Home, having succeeded to the estate of Wedderburn, revived it against Wood's representatives; for whom it was

Pleaded in defence: However valid the decree obtained by Ninian Home may be, so far as the public is concerned, it can have no effect in a question with those who are not parties to it. Neither can it invalidate the previous decree, in virtue of which Robert Wood and his successors have, ever since, held the lands of Whitsome as vassals of the crown.

The claims upon which these decrees proceeded, were both in court at the same time, and they were both opposed by the same counsel, on the part of the public. Yet no notice was taken of any inconsistency between them. Mr Ninian Home neither opposed Wood's claim, nor attempted to set the decree aside after it was pronounced. The reason of all this is obvious. The trustees for the public were happy that an opportunity offered to save the family of Wedderburn. But they, as well as Mr Home himself, were sensible that so far as a private party was concerned, the plain rules of law were not to be departed from; nor would Mr Woods claim, made under the authority of an express act of parliament, be refused without injustice.

Answered: The statute under which Mr Ninian Home claimed, did not require that the vassals should be made parties. It was a public law, which was to take effect in the course of a few months, and to which the attention of all concerned was called forth. Mr Wood, therefore, ought to have opposed Mr Home's claim, as far as it affected his right; and his not doing so, leaves it to be presumed, that he was satisfied of the justice of that claim.

Mr Home, on the other hand, had no title to oppose Wood's claim, till his own was sustained; and then it appeared unnecessary to bring it under challenge; because the decree in his favour having declared, that George Home of Wedderburn had no estate in him, which could be forfeited, it followed as a necessary consequence, that the decree, excepting this superiority from the supposed forfeiture, was altogether ineffectual.

The defenders also endeavoured to show, that Ninian Home's claim was ill-founded; but the court were of opinion, *that they had no power to review a decree of exception pronounced under the authority of the statute above mentioned*; and, therefore, adhered to the

Lord

Lord Ordinary's judgment, which was, ' In respect that, by the ' decree in favour of Mr Ninian Home in the 1719, it is declared ' that the crown, the defender's author, had no right to the lands ' and estate of Wedderburn, (of which the superiority of Whit- ' some was a part) by the attainder of George Home ; therefore, sus- ' tains the reasons of reduction.'

Lord Ordinary, *Stonefield*. Act. R. *Dundas*. Alt. A. *Abercrombie*. Clerk, *Tait*.

L.

No. LXIV.

July 3. 1781.

JAMES THOMSON,

Against

WILLIAM PAGAN.

Minor.—*Quadriennium utile*.

JAMES THOMSON, a minor, granted a receipt, along with his father, for two bills, which they became bound to give back entire, or otherwise to pay the contents to William Pagan the original holder of them. The bills were delivered to the father, who afterwards became insolvent ; and Pagan, at the distance of ten or twelve years, brought an action against the son for payment, or re-delivery. He again brought a reduction of the debt, *ex capite minorennitatis*, in which it was

Pleaded for Pagan : That the action was incompetent, as not having been brought within the *quadriennium utile* ; Erskine, larger Institute, p. 133. § 35.

Answered : A distinction should be made between deeds which are *ipso jure* null, and deeds which are valid till cut down by a rescissory action.

Of this last kind are deeds granted by a minor who has no curators ; or by one having curators, with their consent. These subsist till set aside in a proper action ; and that action cannot be brought after the *quadriennium utile* is expired.

But, where deeds are granted by a minor, having curators, without their consent, there is no occasion for a rescissory action. They are *ipso jure* null. The *quadriennium utile* does not apply ; and the exception arising from the minority of the granter need not be pleaded, till he finds it necessary to defend himself against the consequences of his imprudence.

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This distinction we have borrowed from the Roman law ; and it is adopted by all our lawyers, particularly by Lord Bankton, B. 1. tit. 7. § 88.

In the present case, the pursuer was certainly under the legal curatory of his father. But no curator can be *auctor in rem suam* ; and, therefore, his consent to the deed in question, of which he himself was to reap the whole advantage, was the same as if no consent whatever had been interposed.

As the deed was clearly in favour of the father, who could not be *auctor in rem suam*, the court adhered to the judgment of the Lord Ordinary, ' sustaining the reasons of reduction.'

Lord Ordinary, Kennet. Act. Cha. Hay. Alt. D. Armstrong. Clerk, Colquhoun.

L.

No. LXV.

July 3. 1781

HELENUS HALKERSTON,

Against

JAMES WEDDERBURN.

Right of a conterminous heritor as to trees protruding from another's property.

MR HALKERSTON, thinking his garden at Inveresk injured by a row of elms, the branches of which hung over it from the garden of Mr Wedderburn, applied to the sheriff for redress. After various steps of procedure, the cause was removed to the Court of Session by advocacy ; when the following abstract question came to be considered, viz. Whether a person is bound to allow his property to be overshadowed by the trees belonging to a conterminous heritor ?

Pleaded for Mr Wedderburn : The climate of Scotland is such as has induced the legislature to encourage the planting of forest-trees in hedge-rows for the sake of shelter ; and, for some time, it was even imposed as a duty upon every proprietor ; act 1661, cap. 14. This, however, would have been an elusory enactment, if the common law permitted a conterminous heritor to lop such trees, whenever their branches extended beyond the line of march. By the common law, an heritor may plant so near the march, *in prædiis rusticis*, that the trees will protrude their branches into the air, over the adjacent ground ;

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nor is there any thing in that law, which authorises the conterminous heritor to lop off such branches, unless he can qualify a material damage arising from their protrusion.

In England, as well as in Scotland, the highways are understood to be vested in the King, for behoof of the public ; yet, in both kingdoms, statutes have been found necessary to authorise Justices of the Peace, way-wardens, &c. to cause prune trees hanging over the road ; which could not have been the case, had the common law allowed any such power to a conterminous heritor.

In like manner, though the Roman law allowed the proprietor of a *prædium rusticum* to prune such trees to the height of fifteen feet, yet this was not a right inherent in him upon the principles of common law, but was derived from the laws of the twelve tables, and confirmed by an edict of the Prætor ; L. 1. § 7. 8. 9. ff. *De arb. cæd.* And this very limitation of the right shews, that the Romans did not think the protrusion of branches in itself any encroachment upon the right of property ; except so far as it obstructed or impeded the immediate exercise of it. They considered the air as a *res communis*, incapable of appropriation ; and thought, that no encroachment upon it afforded a proper ground of challenge.

Answered for Mr Halkerston : It is understood to be a general rule of law, that no person is entitled to encroach upon the property of another, unless he can shew a right of servitude to that effect. One may dig a trench upon his own property, though the effect of it may be, to cut the roots, and destroy the whole of his neighbour's trees. He may raise his wall to any given height ; and, in doing so, he may cut down every branch that stands in his way. While a branch from his neighbour's tree does him no harm, he will allow it to remain, upon the same principle of good neighbourhood, that he allows him to hunt over his fields, or to angle in his stream. But the moment this branch does him a real or an imaginary injury ; whenever, in short, he wishes to remove it, the law entitles him to do so, in the same manner, and upon the same principles, that it entitles him to protect his property from any other kind of encroachment.

The regulations for the encouragement of planting and inclosing, introduced by the act 1661, can never apply, with any propriety, to two contiguous gardens in the village of Inveresk ; and it is not very obvious how the powers given by statute to the public officers entrusted with the care of high-ways, at all derogate from the private right of parties to demand what they are impowered to do.

Neither does the argument on the other side derive any support from the Roman law. The edict referred to, related only to *prædia rustica* ; but, where a similar encroachment was made upon a *prædium urbanum*, as seems more properly to be the case here, another edict of the Prætor authorised the whole tree to be cut down ; L. 1. § 2. ff. *De arb. cæd.* At any rate, it is nothing to us, in what manner the Romans chose to limit the *natural* right now contended for. Under an Italian sun, it might probably be thought, that there could not be too much shade ; but the same idea can never be entertained in a northern climate ; and, accordingly, the learned Groenwegen, in his treatise,

treatise, *De legibus abrogatis et inusitatis, in Hollandia vicinisque regionibus*, says expressly, ‘ Si arbor fundo, vel ædibus alienis impendeat nostris et Gallorum moribus, non totam arborem a stirpe excindere, sed id quod super excurrit in totum adimere licet ;’ tit. *De arb. cæd.*

The court had no doubt upon the principle ; and, therefore, adhered to the Lord Ordinary’s interlocutor, ‘ Remitting the cause to the sheriff, with this instruction, that he find Mr Wedderburn is bound to prune his trees in such a manner, as they may not hang over the mutual wall, and thereby be of prejudice to Mr Halkerston’s fruit and garden.’

Lord Ordinary, *Braxfield.* Act. *Alex. Abercrombie.* Alt. *Crosbie.* Clerk, *Campbell.*

L.

No. LXVI. E O D E M D I E.

YORK-BUILDINGS COMPANY,

Against

WAUCHOPE.

Jurisdiction of the Court of Session.—Prescription.

JAMES WAUCHOPE acquired right to an old debt on the estate of Earl Marishal, which had been ascertained by decree of the commissioners, and declared to be a subsisting charge on the estate, in terms of the act 4th of George I.

The York-Buildings Company, to whom the Marishal estate was sold, transacted this, along with the other debts affecting it, and gave Mr Wauchope, in payment, four of their transferable bonds, amounting to L. 325 Sterling: He, on the other hand, obliging himself to grant the Company a proper conveyance of the debt, upon actual payments being made; but, at the same time, reserving the effect of his diligence and other rights, in case of non-payment.

When the Company came to accompt in exchequer for the price of the estate, it was agreed that they should be allowed credit for what sums they had actually paid in transacting the debts affecting it. But, as no direct or sufficient vouchers were produced, to show that the four bonds above mentioned had been paid, the Barons determined,
‘ That

‘ That they could not give the company allowance out of the price of the estate, for the sum of L. 375 Sterling, said to be paid to Mr ‘ Wauchope.’ They afterwards refused a petition presented by the Company. And these judgments were affirmed by the house of Lords, upon appeal.

In the mean time, the company had brought an action before the court of session, against Mr Wauchope’s representatives, concluding, that they should make up titles, and denude in terms of *his* obligation; and the defenders not appearing, decree was pronounced in terms of the libel. When, therefore, the question was finally determined against the Company in the court of exchequer and House of Lords, for want of sufficient vouchers of payment, they proceeded, in the view of supplying that defect, to carry the decree of the court of session into execution. A suspension, however was obtained; and, in discussing the reasons, it was

Pleaded for the suspenders: The obligation founded on had fallen by the negative prescription, long before any demand was made in consequence of it; at any rate, as actual payment was the condition of that obligation, nothing but a direct proof of such payment can entitle the chargers to the conveyance they are now insisting for. No such proof, however, has yet been brought, as is evident from the judgments both of the court of exchequer and House of Lords. These judgments cannot surely be reversed in the present process; and, although it were competent to do so, it seems absurd that the suspenders should be obliged to grant an assignation acknowledging a payment to have been made, which does not consist with their knowledge, and has not yet been properly instructed.

The suspenders, it is true, have not the bonds to produce; nor have they hitherto attempted to prove the tenour, or asked payment of them, but *that* they may do or not, as they shall be advised. These bonds may still be recovered; and were the suspenders to grant the conveyance now demanded of them, which must necessarily proceed upon the narrative of payment, they would for ever be precluded from making any advantage of them.

Answered for the chargers: There are here no *termini habiles* for pleading the negative prescription. For, *first*, the present demand is founded not merely on an *obligation*, but on a *duty* which every good man owes to his neighbour, and which, therefore, cannot prescribe. *Unusquisque præsumitur consentire in id, quod sibi non nocet, et alteri prodest.* The suspenders cannot, by any direct action, recover a discharge of this debt, because the bonds are prescribed many years ago. They can, therefore, lose nothing by the conveyance demanded; while, on the other hand, the chargers, if that conveyance is withheld, must again pay a sum of money, which there is good reason to believe they have already paid, though the evidence of payment is in some sort defective. *2dly*, The present demand resembles an action of war-randice. It was not, till lately, that the Barons of exchequer ultimately disallowed the chargers claim; and the prescription can only run from the date of their judgment.

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The obligation then being still in force, the suspenders must produce the bonds in question, or they must grant the conveyance demanded.

It is clear, that these bonds have either been paid, or are still outstanding. In the one case, the condition of the obligation has been fulfilled; in the other, a debt remains upon the estate, for which the chargers are entitled to have credit in accounting with the crown.

Nor are the chargers barred from insisting, by any orders pronounced by the court of exchequer upon this matter. The Barons have no jurisdiction as a court of record, except in matters of revenue. They are here settling the price of the Marischal estate, as commissioners of the treasury; and, although, in that character, they necessarily heard and decided upon the claims of parties, yet they did so, only in their *official*, not in their *judicative* capacity. Their *opinions* could not prevent any of the parties from bringing an action before the court of session; and to the judgments of this court the Barons of exchequer must give effect, whatever may be their own sentiments; agreeably to the determination of a late case between Captain Elphinston and Mr Haldane of Gleneagles, affirmed by the House of Lords. Indeed, the appeal in the present case was dismissed *as incompetent*, for this very reason, that the Barons had not given judgment as a court of Judicature, but had disallowed the claim as commissioners of the revenue, whose resolves could be altered by the Lords of the Treasury alone.

The Lords ‘ found sufficient presumptive evidence that the four several bonds in question, granted by the York-Buildings Company to James Wauchope, late merchant in Edinburgh, amounting to three hundred and twenty-five pounds Sterling, are satisfied and paid by the York-Buildings Company; that no prejudice can arise to the representatives of the said James Wauchope from granting the conveyances of the said debt now pursued for, in favour of the York-Buildings Company and their creditors, and of consequence that the defenders have no interest to plead the negative prescription; and, therefore, decerned and ordained them to convey and make over said debt accordingly, but with warrandice from their own fact and deed allenary.’

Lord Ordinary, *Alva.* Aēt. G. B. Hepburn. Alt. M'Laurin. Clerk, Colquhoun.

L.

E.c

No.

No. LXVII.

July 3. 1781.

JAMES OGILVIE,

Against

JOHN FYFE.

Expence of a discharge and conveyance.

OGILVIE granted an heritable bond to Fyfe for L. 150 Sterling, on which an adjudication followed. The incorporation of hammermen of Canongate, who were also adjudging creditors, agreed to pay up the debt, on getting a conveyance of the security. Fyfe restricted his penalty to the expences he had really laid out, with interest from the date of each disbursement; and received payment accordingly. The conveyance was made out by the assignee's agent; and a demand having been made upon Fyfe, for so much of the expence thereof, as was reckoned equivalent to that of a simple discharge, he brought the matter before the court by suspension, and

Pleaded: The suspender, in virtue of his adjudication, was entitled to have drawn his whole accumulated sum with interest; and it was only on condition of getting his principal and interest paid down to him, without any deduction, that he agreed to give up his penalties. It would, therefore, be contrary both to good faith and equity, should the charger, at the same time, be allowed to keep his discharge, and to get back any part of the consideration which he gave for obtaining it.

It is perhaps the *common*, but by no means the *universal*, practice, that the creditor pays for the discharge. But this practice is evidently owing to there being no other proper fund for the payment of such expence; and, therefore, *it* can have no influence here, where there was a fund, namely, the penalties, more than sufficient for that purpose. Had the suspender paid the expence now demanded, there is not a doubt but he might have charged it against his debtor, and have insisted for payment of it out of the penalties, before denuding. And, had the charger refused to allow these expences at that time, the consequence must have been, that the suspender would have held by his adjudication, and would have drawn in the name of penalties about L. 25 Sterling more than he received by the transaction in question.

Answered: Although the penalty in a bond appears *ex figura verborum* to be forfeited, upon the debtor's failing to make payment, yet, equity has interposed to moderate the rigour of the obligation,
and

and has in practice restricted the claim of the creditor to the expences he has actually incurred *in recovering his debt*. In this view, the stipulation has nothing really penal in its nature. It is only intended to put it in the creditor's power, without the trouble of a separate action, to recover what expences he may have incurred in operating his payment; and, therefore, the creditor can exact no more of it than the amount of those expences, which he could have recovered by an action at common law.

But, where no penalty is stipulated, it is clear that the expence of the discharge could not be recovered by a separate action, like the expence of diligence; and, upon the same principle, where the obligation contains a penalty, the expence of the discharge cannot be taken out of it. In short, the creditor is in no case entitled to receive more than his principal, interest, and expences of diligence. If he receives payment of his debt when due, he must himself, by the common practice, be at the expence of the discharge; and he is bound to be at the same expence, upon recovering his debt, *and* the expence of his diligence, which is all that the debtor's delay of payment has occasioned.

The court had no doubt, that, in practice, it is usual for the creditor to pay the expence of the discharge. But, as the creditor here had given up his penalties, they thought he should not be liable. They, therefore, 'suspended the letters *simpliciter*; and found the 'charger liable in expences.'

A reclaiming petition was refused without answers.

Lord Ordinary, *Alva*. Ad. H. *Erylone*. Alt. C. *Hay*. Clerk, *Tait*.

L.

No. LXVIII.

July 4. 1781.

G R I E R S O N,

Against

W I L L I A M K I N G.

Writ defective in solemnities.—Jus mariti.

WILLIAM KING, by his father's settlement, was left sole heir and executor, burdened with the payment of L. 20 Sterling to each of his sisters, payable the first term after his decease, 'with
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‘ the due and ordinary annualrent from the said term, during the non-payment thereof.’

Robert Grierfon had married one of the sisters, several years before. She survived her father; and, some time after her death, Grierfon brought an action, in name of his children, against his brother-in-law, for payment of the legacy above mentioned. King produced a discharge by Grierfon, against which it was, *inter alia*,

Pleaded for the Pursuer: 1mo, The discharge founded on, is not holograph; the writer is not designed; nor are there any witnesses either designed or subscribing. In terms, therefore, of the act 1681, it must be ‘ null and void, and can make no faith in judgment.’

The decisions upon this point are numerous; Dictionary, *voce* Writ; and there are many of a recent date: December 26. 1752, Graham *contra* Grierfon, Fac. Coll. vol. 1. No. 55.; Mackenzie and Lawfon *contra* Park, November 29. 1764; Sheddan *contra* Sproul-Crawford, July 6. 1768.; and Crichton and Dow *contra* Syme, July 25. 1772. But one that more particularly applies to the present case is, the decision in the 1763, Creditors of Young *contra* Little, where a discharge of a legacy of L. 20 Scots, conceived in the form of a missive letter, and subscribed *before two witnesses* properly designed, was found to fall under the statute, as wanting the *designation of the writer*.

2do, Robert Grierfon had no right to discharge the legacy in question. By his father-in-law’s settlement it was declared, that this provision should bear interest from the term of payment. As, therefore, it was a sum that, before the act 1661, cap. 32. would have been accounted heritable, it still remains so *quoad* the rights of husband and wife; and consequently, could not fall under the *jus mariti*, or be properly discharged by the husband.

Answered: 1mo, The design of all the statutory solemnities of writings is, to guard against forgery; and, where the verity of the subscription, as in the present case, is not denied, the deed, though defective in these solemnities, should be binding upon the party, except in cases where the law or practice has made *writing* an *essential requisite*; Bankt. B. 1 tit. 11. § 48.; November 26. 1695, Beattie; and July 15. 1739, Crofbie. It is to these cases that the statute more particularly applies; while others have, in practice, been exempted from the shackles of form, and are daily sustained, though destitute of all the statutory solemnities; Campbell *contra* Lennox, December 18. 1739; Foggo *contra* Milliken, December 20. 1746; Henderson *contra* Murray, December 5. 1765; and Clark *contra* Rofs, January 19. 1779.

Numerous decisions, too, are collected in the Dictionary, *voce* Privileged Writs, where deeds defective in point of form have been sustained; and, among these, *discharges* are particularly mentioned. It is true, that most of the cases there observed, were of discharges between masters and tenants. But, if the *rusticity* of tenants is sufficient to exempt them from legal forms, the same mild maxim should be extended, without reserve, to all transactions which appear to be *negotia inter rusticos*; and will apply, with the greatest propriety, to such a case

case as the present, where, perhaps, neither of the parties ever saw or heard of a discharge, but in its simplest form.

2do, Although the act 1661, cap. 32. declares, *in general*, that obligations for sums of money, containing a clause for payment of annual-rent, shall not fall under the *jus mariti*; yet, the legislature certainly pointed at such obligations only as are conceived in the form of a *bond*, strictly so called; and by no means to those common obligations, where the interest is stipulated, principally as a spur to make the debtor more punctual in his payment; Erskine, b. 2. tit. 2. § 10. Gillhagie *contra* Orr, December 13. 1738. This is always to be presumed, where the interest is made to run, not from the *date* of the obligation, but from the term of *payment*; but, were such a clause to alter the nature of the obligation, from moveable to heritable, the *jus mariti* would be excluded in many cases, where it has never once been doubted that it takes place.

This last point was thought to depend altogether upon the circumstance, whether the term of payment had come or not before the date of the discharge; which the papers left uncertain. But the court being of opinion, that the transaction was such, as rendered writing essential, and required the statutory solemnities, they ‘repelled the defence founded on the discharge.’

Lord Ordinary, *Kaimes*.

Act. *R. Cullen*.

Alt. *Mark Pringle*.

Clerk, *Tait*

L.

No. LXIX.

July 4. 1781.

H E P B U R N and S O M M E R V I L L E,

Against

C A M P B E L L of Blythwood.

Sale.—Error in substantialibus.

UPON the death of James Campbell of Blythwood, his apparent heirs of line were advised to bring the unentailed estate to sale, under the act 1695, cap. 24. Part of this estate, consisting of some borough-acres in the neighbourhood of Renfrew, was purchased by Mr Campbell, the heir of entail; but, before the sale came to be reported,

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or any interlocutor pronounced, it was discovered that a mistake had been committed in fixing the upset price according to the proven rental of two acres and a half; whereas the subjects really amounted to seven acres. A question, therefore, arose, whether Mr Campbell, in virtue of his purchase, had right to the whole, or to a part only of these acres?

Mr Campbell contended, That he had right to *the whole*; because the different parcels composing the seven acres, were *all specially enumerated* in the summons of sale; and because, in the letters of publication, and in the minutes and articles of roup, *all the unentailed acres* are said to be exposed.

The apparent heirs, on the other hand, referred to the advertisement in the news papers, wherein the lands exposed to sale were limited by a specification of *their proven rental*, and to the state of the process, to show that said rental applied to no more than two acres and a half.

Observed on the bench: Every sale, whether voluntary or judicial, may be set aside by an *error in substantialibus*; nor will even a decree of sale be sufficient to bar a purchaser from pleading such an *error*; as was determined in the case of Dalmahoy. But here no decree has been pronounced; there seems to have been an *error* on both sides; and neither party is entitled to take advantage of the other's mistake.

The court found, ' That no more of the borough acres were sold
' than to the extent of two acres and a half, and that the remainder of these acres still remained to be sold; but that it was
' optional to Blythwood, either to hold the purchase, or to reject
' the same, as he should think fit.'

Lord Ordinary, *Monboddo.* Act. *Ilay Campbell.* Alt. *Tait.* Clerk, *Campbell.*

L.

No. LXX.

July 4. 1781.

ALEXANDER M'KENZIE,

Against

G U L L E N, and others.

Removing.—Rental-rights.

AT the judicial sale of the Winton estate, belonging to the York-Buildings Company, two lots were purchased by Mr M'Kenzie; who, having expedited a charter, and taken infeftment, pursued an action

tion of removing against the whole tenants and possessors of the subject.

Among the defenders in this process, were the inhabitants of the village of Seaton; many of whom, together with their predecessors and authors, had for ages possessed, for a trifling duty, the small tenements from which they were now to be removed. These subjects had been long considered by them as their property; they had descended from father to son; they had been transmitted to disponees; heritable securities had been taken upon them; and they had been carried by legal diligence. The present possessors, however, had no *feudal title* to produce; and, therefore, found it necessary to defend their possession upon the following grounds.

Pleaded for the defenders: 1mo, The subjects in question did not fall under the forfeiture of the Earl of Winton; they never belonged to the York-Buildings Company; they made no part of Mr McKenzie's purchase; and, therefore, he has no title to pursue a removing from them.

2do, Not only are the defenders-entitled to maintain their *possession*, against one whose title to remove them appears defective; but they are themselves *proprietors* of the subjects, having such a right as renders them *irremovable*.

That the defenders do not produce *written titles*, in the strict form now practised, is not inconsistent with their being proprietors. It is no more than always happens, where the right is older than the record. The antient titles may be kept up by possession alone, without submitting to the modern forms of constitution by charter and seizin, which, as far down as the reign of James IV. were termed *new inventions*. Such was the opinion of the court, and such was the judgment of the House of Lords, in the case between Lord Stormont and the irremovable tenants, or perpetual rentallers of Lochmaben, determined in the 1726 *. And, under the authority of that decision, it is now incontrovertible in point of law, that a right of property in lands, wherever situated, may be effectually established without the intervention of written titles, or a feudal investment.

Indeed, by the more antient practice, no proprietor held his lands by more than simple possession; and long after the feudal law had been introduced into Scotland, the only method of determining questions of property, was, by the verdict of a jury, proceeding upon a proof of the possession.

On this simple footing, many of the land-rights in Scotland long did, and some of them still do, remain; such as, *1st*, the rights of the tenants and rentallers of the bishopric of Glasgow, and monastery of Paisley, mentioned by Craig, lib. 1. dieg. 11. § 24; *2dly*, most of the rights to bishops' teinds, which rest merely upon possession, and on their appearing in the rent-rolls of the crown kept in exchequer; *3dly*, all, or most of the rights to church-lands before the reformation;—whence the possession of churchmen for a much shorter period than the years of prescription, has, *quoad* such lands, been admitted as evidence of the property; *4thly*, the rights of ministers to their glebes; and

* This decision is not collected.

and, 5^{thly}, such rights as that of the rentallers of Lochmaben, above mentioned. Similar rights are known in most countries, where the feudal law has been established; and such, in particular, are the copyholds of England, which are founded solely on immemorial possession.

It is not, therefore, to be inferred from their wanting written titles, that the defenders are not real feudal proprietors of the subjects in question. That the reverse of this is the case, may be fairly presumed *in re tam antiqua*, from their long possession, and from the report made by the commissioners of inquiry, after an accurate investigation of the rights of parties. It is further proved, by the old rental-book of the estate of Winton, authenticated by the Earl's subscription, wherein, under the title of *feu and rental mails*, are specified about thirty different persons, paying in all L. 45 Scots of money duties; and, in the abstract, this L. 45 Scots is stated in one article as *feu-mails*; which shows clearly that they were feuers or proprietors. And, accordingly, two of the defenders in the present action have been assilzied, as proving themselves really heritable proprietors.

In this old rental too, several of the subjects are described as possessed by *heirs* and *relicts*; which perfectly corresponds with the idea of a feudal right. And that the possessors were universally held and admitted to be heritable proprietors, appears from the various dispositions, securities, and diligences produced by them. It is also remarkable, that the family of Winton and the York-Buildings Company gave no repairs to the houses possessed by the defenders; that their small duties have not been raised for time immemorial; and that no attempt was ever made to remove them, till the present action; circumstances, which argue strongly in favour of the argument now maintained by them.

It is therefore of no consequence by what appellation the defenders are described in the old rental-books; or even that they have been in use to call themselves *rentallers*. The possessors of the four *towns* of Lochmaben were no where termed *proprietors*, but went under the denomination of *poor tenants of his Highness's property*, *occupiers of his Majesty's lands*, *kindly tenants*, and other names the most opposite to any idea of *property*; their duties were called *rents*; and their possessions *rooms*. Yet the court looked to the nature of their right, and found them to be *irremoveable proprietors*.

But, supposing the defenders to be rentallers only, still their title will prove sufficient to defend them against the present action. Rentals are distinguished by law into *feu* rentals and *common* rentals. Formerly, *both* kinds were considered as heritable rights, transmissible to heirs and other successors. And, although the act 1587, c. 69. declared rentals granted by the *crown* to be no better than personal *liferents*, it expressly excepted *feu-rentals* set to men and their heirs, and left *common* rentals granted *by a subject* upon their original footing. Whether, therefore, the rights of the defenders are accounted of the one kind or of the other, they do not fall under the enactment of that statute, but must be *heritable* in the persons of the present possessors.

Nor

Nor is the doctrine, that rentals are not good against singular successors, agreeable to the principles of modern practice. Rentals are a species of tacks; and the act 1449 declaring tacks to be real rights, makes no exception. Accordingly, rentals have been sustained as giving a *perpetual* right; Carruthers *contra* Irvine, 23d January 1717; Dictionary, vol. 2. p. 419; and tacks for a term of endurance almost equal to perpetuity, are also sustained against singular successors; 6th December 1758, his Majesty's Advocate *contra* Frazer; 27th January 1760, Irvine of Lufs *contra* Knox of Kirconnel. In the one case, the tack was for 1140 years; in the other, for 1260. The tacks on the estate of Ormiston too, which, in consequence of the in-terminable obligation upon the landlord to renew them at every return of a certain period of years, do not substantially differ from a rental, have been sustained as good against a purchaser; 7th November, Wight *contra* Earl of Hopeton. And, as the act 1449, upon which all these decisions are founded, entitles every tenant, without distinction, to sit *unto the ischew of their terms*, no good reason can be assigned for denying to rentals the benefit of that enactment.

Answered for the pursuer: In order to support the defenders in their objection to the pursuer's title, it must be taken for granted, that they are the feudal proprietors of the subjects in question. For, if they are not so, and if the Earl of Winton had a right to remove them from their possessions, their cannot be a doubt that *his* right is *now* regularly vested in the pursuer, by virtue of his charter and feizin.

The charter conveys to him *the village of Seaton*, and every *subject and right* which formerly belonged to the York-Buildings Company, lying within the boundaries of his purchase. The subjects in question are locally situated in *the village of Seaton*; and, therefore, it follows, as a necessary consequence, that the right of removing the defenders, competent to the Earl of Winton and to the York-Buildings Company, was conveyed to the pursuer, as much as that of levying the duties which they are bound to pay for their several possessions.

2dly, Although a doubtful or a defective right may be secured from challenge by prescription, yet, a definite and *temporary* right can by no lapse of time become *permanent* and *indefeasible*: nor can a proper feudal title be created by possession alone, without the intervention of a charter and feizin.

The case of *rentallors in general*, affords no aid to the defenders' argument on this point; because, in fact, such rights were never reckoned to be of a permanent nature. It is true, that, antiently, the *King's rentallors* were held to be heritable proprietors; Balfour, *voce* Affedation, c. 28.; and they continued on that footing till the act 1587, c. 69. gave his Majesty a power, with advice of the comptroller, to let the lands at an advanced rent, upon the death of any of the rentallors. But there was something *very special* in their situation; Bankt. b. 2. t. 9. § 43. Placed, as they always were, around a royal castle, they might be considered as a sort of permanent garrison; and their rights being perpetual, could be attended with little inconvenience, as a failure

of duty in them, like that of any other subject, inferred treason, and was punishable by an immediate forfeiture. Whereas a subject, who had not the *same* power of inflicting punishment on his rentallers, however undutiful they might prove, would naturally be led to guard against such inconveniencies, and certainly would have never granted a rental, had it been reckoned a right of perpetual endurance.

Accordingly, there is no reason to believe, that, at any period, rentals granted *by a subject* were accounted permanent rights. The act 1587 was necessary to correct a mistake which custom had introduced with respect to the *King's rentallers*. His Majesty, however, did not always exercise the privilege conferred upon him by that statute; and, in some cases, the lands, with the antient rentallers, came into the possession of a subject, who had no power to remove them. Upon this *speciality* stands the decision in the case of Lochmaben; and, therefore, *it* can afford no support to the general plea, that feudal rights may be created without writing.

Nor is the argument drawn from the different kinds of church-lands more conclusive. The destruction of the title-deeds belonging to the church, at the time of the reformation, was so general, as to give occasion for a particular statute in favour of those who derived their rights from that source.

But, that the possessors of the subjects in question were originally no better than rentallers, is abundantly evident. The family of Winton understood perfectly well the difference between a *feu* and a *rental*; as is evident from the rights produced by the two defenders that have been affoizied, which are proper feu-charters granted by George Earl of Winton, in the 1662. The same difference is marked by the commissioners of inquiry, in framing their report; and the very nature of the thing speaks it, that a chieftain establishing a set of rentallers at his castle-gate, by way of body guard, would choose them for some qualification; but would never think of fettering himself, by rights of an heritable or perpetual nature. Accordingly, that some of these rights were originally *but* rentals, cannot be disputed; and so is to be presumed of all the defenders, who have no better title to produce. Every thing leads to that conclusion; and the contrary can never be inferred from the negative circumstances alledged by the defenders.

Indeed, this is a more favourable construction of these rights, than they are in every respect entitled to. For, that writing is necessary to the *constitution*, as well as to the *probation* of rental-rights, is laid down by Lord Stair, b. 2. t. 9. § 18.; Lord Bankton, b. 2. t. 9. § 41.; and Mr Erskine, b. 2. t. 6. § 27. Yet, not one of the defenders has produced any thing that has the smallest resemblance to a *rental ticket*; nor can they even connect themselves with the persons mentioned in what is *supposed* to be the list of the original rentallers.

But, holding the rights in question to be really *good rentals*, it is a proposition, established by the concurring opinions of all our most respectable authors, that a rental-right, granted even to heirs, goes no further than to the *first heir*; Craig, l. 1. dieg. 9. § 10.; Spottiswood, tit. Removing and rentals, p. 290.; Dict, vol. 2. p. 73.; Lord Stair, b. 2. tit.

tit. 9. § 17. And his Lordship mentions a case, Lord Seaton *contra* his tenants, which shows that the family of Winton did not understand a rental to be more than a temporary right, pendent on the behaviour of the rentaller, and renewable, or not, at the master's pleasure; Ib. § 19.; Sir George M'Kenzie, b. 2. t. 6. § 9.; Bankton, b. 2. t. 9. § 41.; Erskine, b. 2. t. 6. § 37. and 38.; Kilkerran, *voce* Personal and Real, No. 9.

In opposition to these authorities, the decision in the case of Lochmaben, proceeding upon a speciality very different from any thing that occurs here, can have no weight. Both the general principle, and the particular usage of this barony, concur in reprobating the idea of a rental's conveying a permanent right. The defenders' original authors, though considered in the most favourable light, had no more than beneficial leases for two lives; and *they* have produced nothing to shew that *their* right *now* stands upon a better footing.

Nor does the pursuer's situation, as a singular successor, render his right of removing more doubtful. His title is rather the better on that account. For obligations respecting lands, which would be ineffectual against a purchaser, are frequently sustained against the granter and his heirs. But, as the rights of the defenders terminated many years ago, with the lives of the *first* heirs, the pursuer's title to insist in the present action stands altogether unquestionable.

Few of the judges expressed any doubt, and the court adhered to the interlocutor of the Lord Ordinary; 'Sustaining the pursuer's title, and decerning in the removing.'

Lord Ordinary, *Braxfield*. Act. *G. B. Hepburn et Elphinston*. Alt. *G. Wallace et Croftie*.
Clerk, *Robertson*.

L.

No. LXXI.

July 4. 1781.

KATHARINE CLARK,

Against

JOHN ROBERTSON, and others.

Personal and Real.

ALEXANDER HARVEY left a considerable estate to his three daughters, burdened with an annuity of L. 65 Sterling to Janet Clark, his relict. One of the daughters was married to Joshua Johnston;

son; who, wanting money to throw into trade, prevailed upon his mother-in-law to make way for a sale of the subjects, by giving up her security, and accepting of a personal bond for her jointure, from him and the other partners of a company in which he was engaged.

Among these were John and James Jamieson, father and son; who, in this way, came to be personally liable for Mrs Harvey's jointure. John, some time before his death, executed a settlement in the form of a trust-disposition, whereby the trustees were directed to convert his estate and effects into money, for payment of *all his just and lawful debts*, particularly certain family provisions therein mentioned, and to account to his son, James, for the *residue*.

Upon John's death, his trustees, without entering into the management, executed a disposition, proceeding upon the narrative, that James had paid or given security for the provisions and debts *specified* in his father's settlement, and had become bound to *satisfy and pay any other debts, and perform any other deeds that might be owing or prestable by his late father*; and, therefore, disposing to him, his heirs, and assignees, the subjects and rights vested in them by the trust-disposition above mentioned.

James accordingly took possession of every thing, and continued in good credit for several years. But being engaged, as a partner, with Buchanan, Hastie, and Co. who failed, he found it necessary to convey his whole subjects, heritable and moveable, to trustees, for behoof of his creditors.

Against these trustees, Mrs Harvey brought an action for having it found, that John Jamieson's heritable estate was *really burdened* with her annuity, for which he, along with Joshua Johnston and others, had given bond; that, in virtue of that bond, and the trust-disposition executed by him, she was a *real creditor* upon his estate; at least, that the obligation constituted by said bond in her favour, was a *preferable debt*, in the question with a creditor of James Jamieson, or Buchanan, Hastie, and Co.

In the course of this process Mrs Harvey died; but the cause was taken up by her sister, Katharine Clark, as having right to the bygone annuities; and, for her, it was

Pleaded: John Jamieson became debtor for the annuity in question, by joining as co-obligant in the bond granted to Mrs Harvey. The payment of his debts was one of the primary objects of the trust-deed executed by him; and all that James had right to was the *residue* or reversion. The subsequent conveyances, from the original trustees to James, and from him to the defenders, had both of them that trust-deed for their basis; and, therefore, could carry no more of the estate belonging to John, than what remained *free*, after paying all his creditors.

Had James made up titles to the estate in question, as heir; and, after possessing it for three years, had conveyed it to trustees for payment of his debts, it may be admitted, that his father's creditors would have had no preference over his own; but, coming in place of the trustees appointed by his father, the purposes of that trust remaining unexecuted, he could not, in any way, disappoint the *jus quæsitum* which his

his father's creditors had over the estate assigned to him. Had James himself been sole trustee, he could not have converted the estate to the payment of his own debts; and it does not occur, how his right should be rendered broader, by his coming in the place of the trustees.

Answered: James Jamieson's credit was such as fully justified his father's trustees in giving up the management to him; and, accordingly, they were disinterested from an action at the instance of one of John Jamieson's creditors, who endeavoured to make them liable for his debt, on account of their having conveyed the estate to James, without taking security, that the purpose of the trust should be fulfilled.

James, however, stands in a very different situation. He was his father's apparent heir; the residuary legatee of all his effects; and, when he accepted of them without inventory or account, under the condition of paying his father's debts, he subjected himself universally to all such claims. He is, by the act 1695, by the express tenor of the settlement, and by every rule of law, liable to pay them to the last farthing.

At the same time, the creditors of John Jamieson have no real *lien* or preferable claim over the subjects. If they have, they must be preferred not only to James' personal creditors, but to such as, trusting to the public records, may have lent him money on the security of an estate which appeared to be altogether unincumbered.

But, that they have no such *lien*, is evident from this consideration, that, if the original trustees had exercised the power conferred upon them by the trust-disposition, and sold the subjects, a purchaser from them would have been safe; and had the trustees, instead of fulfilling the purposes of the trust, applied the money to their own use, the creditors of John Jamieson would have been in no better condition than the private creditors of the former.

Even supposing that the subjects had been conveyed, without the intervention of trustees, to James himself, but under the same burdens and conditions as occur here, the obligation to pay *debts in general*, could never have constituted a *real* security in favour of such creditors; Broughton *contra* Gordon, June 28. 1739, observed by Lord Kilkeran, *voce* Personal and Real; Stenhouse *contra* Innes, February 21. 1775; Camerons *contra* Creditors of Cameron *. Neither is it very obvious how the word *trust* should make any alteration on the nature of the deed. Every disposition from a father to a son, with the burden of debts, is a trust; but still the burden remains personal, unless the debts are specially enumerated in the disposition, and engrossed in the investiture. Were it otherwise, the security of the records would be overthrown; and, henceforth, every settlement would be conceived in the form of a trust-conveyance to the heir, with a general burden of latent family-provisions, sufficient to cover the whole estate, and to prevent it from being affected by any debt he might contract.

In the present case, the record did not point out James as even nominally a trustee. He completed his feudal title upon the procurator-

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* A late case, not yet collected.

ry contained in his father's disposition, which the trustees had never exhausted, and appeared as absolute proprietor in his own right, with the burden only, which the law itself laid upon him at any rate, of paying his father's debts. To that effect he was, no doubt, *personally* bound; but no real *lien* was created upon his property; Erskine's Institute, p. 205.

Replied: It is of no consequence that the debt in question was not particularly mentioned in the trust-deed; nor is it necessary for the pursuer to contend, that her sister had a *real lien* over the subjects, which would have affected a singular successor. No such *lien* was created in favour of any of John's creditors; on the contrary, the trustees were empowered to sell the subjects; but, while they remain unsold, they are primarily liable to the granter's creditors, whose interest cannot be affected by the debts of the trustees, or those to whom they assigned the subjects.

It may be admitted, that, where the absolute property is conveyed either to an heir or to a stranger, with the general burden of all the granter's debts, no real lien is established in favour of the creditors; but, here, there was no conveyance of property. The subjects were disposed in trust, for certain purposes particularly mentioned; and, so long as they are held under that title, they must, in the first place, be applied to those purposes.

The Lords found, ' That Katharine Clark had no preference over
' the other creditors of James Jamieson for the debt in ques-
' tion.'

Lord Ordinary, Justice Clerk.

Adv. Wight.

Adv. Hay Campbell.

Clerk, Tait.

L.

No. LXXII.

July 4. 1781.

ROBERT MANSON-SINCLAIR of Bridge-end,

Against

JOHN SINCLAIR of Frefwick.

Title to exclude.

THE estates of Latheron and Dunbeath formerly belonged to a younger branch of the family of Mey; but, in the 1720, the last mentioned estate was carried off by an adjudication. In the 1751, James Sinclair of Latheron, the apparent heir of Dunbeath, disposed

disposed his right to said estate in favour of William Sinclair of Frefwick, who undertook to insist in a reduction of the debts and diligences affecting it, or, at least, to call Sir William Sinclair, the son of the original adjudger, to account for his own and his father's intromissions; and engaged to pay Latheron whatever balance should remain of L. 3000 Sterling, after clearing off the debts with which the estate was burdened.

Frefwick, having completed his title, by charging James to enter heir to his predecessors, and by leading an adjudication upon a trust-bond for the accumulated sum of L. 12207 Sterling, raised a process of reduction, improbation, and declarator of extinction, against Sir William Sinclair. They afterwards, however, in the 1752, entered into a private transaction, in consequence of which, Sir William disposed to Frefwick the estate of Dunbeath; and Frefwick, on the other hand, besides taking the burden of certain debts affecting Sir William's other lands, procured him a discharge of all claims competent to Mr Sinclair of Latheron.

Upon James Sinclair's death, his son, in order to bring these transactions under challenge, granted a trust-bond for L. 15000 Sterling to Mr Manson-Sinclair of Bridge-end, who, thereupon, obtained an adjudication against him, as charged to enter heir to his predecessors; and raised a process of reduction, improbation, declarator, and payment, against the representatives both of Frefwick and Sir William Sinclair.

Frefwick produced two sets of titles; the one flowing from the original adjudger, in virtue of his transaction with Sir William Sinclair; and the other from the heir of the reverser, completed by the adjudication above mentioned. These, he contended, were sufficient to exclude the pursuer's title.

Pleaded for Bridge-end: When the defender, in a reduction, attempts to found an exclusive title upon some of the very deeds called for in the summons, it is incumbent on him to show, that these deeds could not *possibly* be set aside, even if the pursuer were admitted to challenge them. Upon this principle, in the case of Drum, although the court sustained a decree of sale, which is the most unexceptionable of all titles, as sufficient to exclude; yet, as it was alledged, that the sale had been carried on by fraud and collusion, the House of Lords reversed the judgment, and obliged the defenders to make a full production.

But here the defender has not so good a title to produce. The writings founded on give him indeed a seeming title to the estate. But, as the charge of fraud, if it had been made good, *would have* proved fatal to the decree of sale, in the case of Drum, so it *may* prove fatal to the defender's right to the estate of Dunbeath, that Sir William Sinclair, one of his authors, had no interest in it; and that the transactions with him, and with James Sinclair, the other pretended author, were both of a fraudulent nature.

Answered for Frefwick: It is not *hujus loci* to enquire, Whether Sir William Sinclair's title to this estate was good or bad. His father's charter and infeftment were obtained in the 1722. Under that title the estate has ever since been possessed; and the right is now established

blished by the positive prescription, beyond all possibility of challenge, except on the head of *falsehood*; Erskine, b. 3. tit. 7. § 4.

Accordingly, it has been the practice of the court in similar cases, to sustain possession for *forty years* upon a charter and seizin, as sufficient to establish an exclusive title. So it was found in the case of Johnston *contra* Balfour, 7th June, 1745, observed by Falconer, vol. 1. p. 64.; and such was the judgment pronounced by the court, and affirmed by the House of Lords, in the late question between the Duke of Argyle and Sir Allan M'Lean.

Neither does the decision in the case of Drum at all impugn this doctrine. It may be true, that a defender, founding an exclusive title upon a *prior* infestment, must be in a condition instantly to instruct that it is clearly preferable. But this can never be the case with a *posterior* infestment, unless secured by the positive prescription. The title founded on by the defenders in the case of Drum, was *posterior* to the pursuer's; and how unexceptionable soever it appeared *ex facie*, it could not *per se* afford an exclusive title, when challenged upon relevant grounds, within the years of prescription.

If then the title, which was in the person of Sir William Sinclair, is now secured by the positive prescription, the defender cannot be obliged to enter into any discussion of it. A challenge of fraud is now incompetent; and there is no room for enquiry, how, or in what manner, the title was obtained; Bankton, b. 2. tit. 12. § 49. It is, therefore, to no purpose, for the pursuer to contend that the conveyance from Sir William Sinclair to Freswick was fraudulent. Such a plea is *jus tertii*. Had Sir William continued in possession, his right would have been established by prescription. The defender coming in his place, must be considered as continuing his possession; and any defect in the connection, however it might entitle Sir William or his heirs to a claim of restitution, cannot give the smallest aid to the pursuer's plea.

2dly, Although the disposition granted by James Sinclair in the 1751, on which the defender founds his other title, be certainly within the years of prescription, yet, it is competent for the pursuer to challenge it on the head of fraud, without making up titles as heir to his father, the granter. So it was found in the case of Douglas *contra* Sommerville, 22d July 1713, observed by Forbes, and collected in the Dictionary, vol. 2. p. 472.; and so it has been uniformly decided ever since.

Neither is the special charge against the pursuer to enter heir to his predecessors sufficient to supply this defect. It, no doubt, connects him with such of his predecessors as were infest, and may give him a title to try the validity of infestments and other rights flowing from them or their predecessors. But it does not, in any shape, connect him with his father, who himself never made up titles to the estate in question.

It is true, the pursuer's father granted a disposition to the late Freswick, and allowed the lands to be adjudged from him on a special charge. But that did not vest the right of the estate in him, except *fictione juris*, and to the effect of creating a title upon which deeds affecting

fecting the estate might be challenged. He thereby, no doubt, incurred a passive title; and, by the act 1695, his onerous deeds were good against the estate. But the estate never was in his person. Had the pursuer, therefore, made up a voluntary title, even by *special service*, it would not have given him the smallest representation of his father, or enabled him to challenge any deeds granted by his father while in a state of apparency. This doctrine is confirmed by the decision in the case of Balbegno, 17th February 1761.

Replied for Bridge-end: The disposition from Sir William Sinclair to Freswick, was in consequence of the previous transaction between Freswick and Latheron. They were *partes ejusdem negotii*; and, if the previous transaction is liable to be set aside on the head of fraud, the subsequent conveyance must be thereby affected, and is insufficient to connect the defender's possession with that of his author, so as to establish a prescriptive right in his person.

At any rate, the possession founded on has been broken by repeated interruptions. The barony of Dunbeath had been disposed in war-randice to Mr M'Leod of Geanzies; and, in the 1728, Sir James Sinclair, as an adjudging creditor, endeavoured to set aside that right, by an action of reduction, improbation, and declarator.—Geanzies brought a counter action; and, in the 1740, prevailed in having it found, that Sir James' claims were extinguished, satisfied, and paid, by his intromissions; and, therefore, that he had no right to the estate of Dunbeath. It is true, this challenge was not made by the reverfer or his heir. But, on the other hand, Sir James' right was not such as required that circumstance to establish a valid interruption. He was, *ab initio*, no more than an incumbrancer, whose title was extinguishable by his intromissions; and, therefore, a judgment at the suit of any third party, finding his right to be null, was sufficient to throw a *vitium reale* upon it, of which others having interest are entitled to avail themselves; and which, even *quoad* them, cannot be removed, without a new possession of forty years from the date of the judgment.

Further, the possession in question was again interrupted, by the process of reduction, &c. at the instance of the late Freswick, and which produced the transaction between him and Sir William Sinclair. In that action Freswick, though assuming the character of an adjudger, was really the trustee of Latheron; and, therefore, *it* must be considered as a valid interruption of the prescription, on the part of Latheron.

2dly, It is not necessary that Latheron should make up titles to his father by a general service. The present action is not in his name, but in that of an adjudger. Such titles are daily sustained in the persons of actual creditors; and it makes no material difference, that the adjudication in question was intended to serve the injured representative of this family.

At any rate, Freswick's own title is of precisely the same nature. He cannot pretend to establish a feudal title, upon the disposition which his father obtained from the late Mr Sinclair in the 1751; but is obliged

to have recourse to the adjudication led upon the trust-bond granted by Mr Sinclair. And, if an adjudication upon a trust-bond granted by an apparent heir, is sufficient to vest a feudal title in the person of the adjudger, an adjudication upon a similar bond granted by the next apparent heir, will surely afford a sufficient title for challenging the former right, upon the head of fraud in the transaction which gave rise to it.

Duplied for Freswick : The circumstances founded on are not sufficient to interrupt the prescription. No action can go farther than the right of the pursuer. M'Leod of Geanzies had no interest, but to disencumber his own purchase, and to preserve his own warrandice on Dunbeath ; and to that effect only could his action reach. A process interrupting prescription is like a reduction *capite inhibitionis* ; which, as to all others, except the inhibitor, is of no avail. *Res inter alios acta vel judicata aliis nec nocet, nec prodest* ; and this rule applies particularly to the interruption of prescription by a process ; Bankton, b. 2. tit. 12. § 54.

In the other action founded on, the late Freswick sustained a two-fold character. As purchaser of the estate from James Sinclair, he insisted for restitution of it ; as trustee for Latheron, he called Sir William Sinclair to account, that as much as possible of the price might be saved for his constituent. In the one view, Freswick was the only person at all interested in the action ; and no third party is entitled to found upon it, to any effect whatsoever. The other conclusion is altogether inconsistent with the present plea, and presupposes, that James Sinclair had previously given up all title to that estate, of which his son was now claiming the property. At any rate, this action was never called in court, and, therefore, has long ago lost its effect as to interrupting the course of prescription ; act 1669, c. 10.

Observed on the bench : This process of reduction-improbation is peculiar to the law of Scotland. The defender is thereby obliged to expose his title-deeds to the whole world. To exempt from this disagreeable necessity those who have, upon heritable titles, enjoyed estates for the course of the long prescription, without interruption, the equity of this court has introduced the expedient of producing titles sufficient to exclude. But to give a defender a claim to this privilege, his titles and possession must be such as cannot admit of challenge. If otherwise, although his right may ultimately be found preferable to that of his competitor, the action must take its ordinary course.

The Court pronounced contrary interlocutors ; but finally found,
 ‘ That the defender had made no production of rights sufficient
 ‘ to exclude the pursuer’s titles to proceed in the reduction.’

Lord Ordinary, Gardenston. Act. Wight. Alt. Hay Campbell et Elphinston.
 Clerk. Menzies.

L.

No.

No. LXXIII.

July 10. 1781.

JAMES JOLLIE,

Against

ROBERT STEVENSON.

Warning to remove from a dwelling-house.

MR JOLLIE was proprietor of a dwelling-house, situated near Picardy, in the suburbs of Edinburgh, in which Stevenson was his tenant. Forty-one days before the term of Whitsunday, Jollie caused a borough-officer of the city to warn Stevenson to remove; and this warning the officer performed in the manner of *chalking the door*, having afterwards reported his proceeding in a written execution. Jollie next brought an action before the sheriff for having Stevenson ordained to remove; which coming into the court by advocacy, it was

Pleaded by the tenant: It is indeed admitted that the statute 1555, cap. 39. ought not to be applied to houses within borough. This exception has arisen from uniform and inveterate custom. But the rules prescribed by the statute admit no other limitation which does not proceed from necessity. Thus, though the particular solemnities relative to lands, are inept with respect to a dwelling-house; yet all the other requisites of the act are equally applicable to such houses as are not situated within a borough, as they are to lands. This distinction is laid down by Mr Erskine, b. 2. tit. 7. § 47.; and by Lord Bankton, b. 2. tit. 9. § 53. The statutory requisites, therefore, not having been complied with on this occasion, it is clear, that the warning in question is illegal and void.

Besides, a town-officer has no power beyond the bounds of the magistrates' jurisdiction. This warning, then, can have no more effect than if any private individual, by the landlord's direction, had given it.

Answered: As it has been admitted, that the act 1555 does not extend to houses within borough, so it is likewise certain, that it relates to lands solely, and not at all to houses, though situated in the country; December 19. 1758, *Lundin contra Hamilton*, Fac. Coll. Nothing, therefore, but sufficient evidence that timeous warning has been given by the landlord to his tenant, whether verbally or by writing, is necessary to found an action of removing from a dwelling-house unconnected with lands; *Tait contra Sligo*, July 3. 1766, Fac. Coll. And, accordingly, though it has been usual for borough-officers to give warning by chalking the doors within borough, yet the authority of a magistrate,

gistrate is not required for that purpose ; so that the ceremony itself seems not to be of any necessity ; June 24. 1709, Barber *contra* Forbes.

The Lords found ‘ the warning sufficient, and remitted to the sheriff, with an instruction to decern in the removing.’

Lord Ordinary, *Westball.*

Act. *Cullen.*

Alt. *H. Erskine.*

S.

No. LXXIV.

July 19. 1781.

JAMES RYMER,

Against

ALEXANDER M'INTYRE.

Writ defective in solemnities.—Homologation.

IN May 1776, a son of M'Intyre's, under eleven years of age, entered into the service of Rymer, in his trade, that of an engraver ; and, soon after, an indenture was executed between them, by which the boy was to become bound as an apprentice to him, for the term of six years. This writing, however, though subscribed by Rymer, by M'Intyre, as cautioner for his son, and by the boy himself, was, in other respects, informal. The testing clause stood thus : ‘ In witness whereof, both the said parties have subscribed these presents, written upon stamped paper by (Signed) Gavin Rymer, shoemaker, and Adam Richardson, ditto.’ And below, these names were repeated thus : ‘ Witness Gavin Rymer, Adam Richardson.’

The boy continued to serve Rymer till October 1779, when his father, on an allegation of bad usage, took him away from his master's service ; upon which Rymer brought an action against M'Intyre, concluding for the penalty, and for damages.

Pleaded for the defender : The indenture, from its wanting such a proper designation of the writer and witnesses, as is required by the act 1681, cap. 5. is void and null. This statute has not, like 1539, cap. 179. left any room for a posterior condescence ; and, as its words expressly declare a writing, so defective, to be absolutely null, no person can reasonably think, that it affords nothing more than an exception which may be tacitly renounced by acts of homologation.

Answered :

Answered: If defective deeds are not to become valid by homologation, a man's titles to his estate may not, even after the years of prescription, afford him any security. It is only *in nudis finibus contractus*, that the statutory nullities have force. Subsequent approbatory acts remove every objection. Such has been found, by many decisions, to be the effect of implement in tacks and in marriage-contracts. Such, too, is the known effect of *rei interventus*. And, surely, the boy's continuing to serve under the indenture for upwards of three years, imports a sufficient homologation; November 23. 1699, *Greelson contra Scott*; January 21. 1735, *Telfer contra Hamilton*.

Observed on the bench: As, in this case, there is full evidence of an agreement between the parties, there would have been good ground, altogether independent of the indenture, for compelling either of them to enter regularly into a written contract.

The Lords, 'in respect of the apprentice's entering into his master's service, and continuing there for three years, by which the indenture was homologated by both parties, repelled the objection of the want of the legal solemnities, made to the indenture.'

Lord Ordinary, *Hailes.* A&C. *H. Erskine.* Alt. *Rae.* Clerk, *Robertson.*

S.

No. LXXV.

July 24. 1781.

B L A C K W O O D S, Supplicants.

Sequestration.

CERTAIN persons of the name of Blackwood, in the character of apparent heirs portioners, brought a process of ranking and sale of their ancestors' effects, heritable and moveable. After the process was called in court, and a proof allowed in common form, they applied by petition to the court, for a sequestration of the heritable subjects, bygone rents, and other effects, not already attached by the ancestors' creditors.

The Lords were of opinion, that a competition of rights alone, authorised them to take subjects into their possession by sequestration; and, as there was no competition in this case, 'they refused the petition.'

A&C. *Rolland.*

C.

K k

No.

No. LXXVI.

July 25. 1781.

H E P B U R N,

Against

S C O T T S.

An adjudication on a trust-bond, vests an active right in the truster, and transmits it to his heirs.

UPON the death of Patrick Hepburn of Kingston, in 1748, that estate devolved on Patrick Scott, his sister's son. Instead of making up titles, by service to his uncle, he was advised to grant a trust-bond, upon which, after a special charge, adjudication was led; and, upon that adjudication, assigned by the trustee, he possessed the estate till 1779, and then died without issue.

A competition ensued between his heirs at law, Elizabeth and Katharine Scotts, his father's sisters, and Patrick Hepburn, who was ninth cousin, and had, by service, entered heir to the person last in the fee of the estate.

Pleaded for Mr Hepburn: When the statute 1621 substituted a charge against the heir, in the place of a service, it was by no means in the view of the legislature to impinge upon the legal succession, nor to vest, in the apparent heir, an active right to the property of the estate. An adjudication, warranted by this act, differs not in matter nor in form from others, and its effects are to be regulated by the same principles. Unless secured by a declarator of expired legal, or by the positive prescription, it cannot convey the absolute property. That must remain *in hæreditate jacente* of the ancestor, till taken up by service of the heir of the investitures.

Considered merely as a right in security, it is extinguishable either by a discharge from the creditor, upon payment of the debt truly due, or by any relevant exception against the obligation which the right is intended to secure. In this case, there is the clearest evidence, from the adjudger's back-bond, that no debt was, in truth, due to him. By the assignment of the adjudication to the person against whom it was led, the debt, if any had ever really existed, must have been at an end.

Adjudications on trust-bonds, considered as tentative processes, are useful to apparent heirs, uncertain of the situation of their predecessors' funds; but no heir ought to rest satisfied with that title. Nor would any person purchase an estate held under it, but would require the heir to enter by service or precept of *clare*, which are the established modes of acquiring property by succession in Scotland.

Answered :

Answered: This mode of acquiring right to an estate belonging to an ancestor, without service, although not in the view of the legislature, was a natural consequence of the act 1621. The heir, by the charge given, *fictione juris*, enters to the estate of his predecessor, so far as respects the sums for which the diligence is used. When, therefore, an apparent heir granted bond for a sum exceeding the value of the estate, and on the bond, qualified by a separate deed, containing a power of defeasance in favour of the trustor, the trustee led an adjudication in terms of the statute 1621, this adjudication, assigned by the trustee to the heir, effectually vested him in the absolute property of the estate; and, upon his death, before assignment, the right of obliging the trustee to re-convey, descended to his representatives.

Apparent heirs, by means of this contrivance, were enabled to possess the estate of their ancestor, upon a singular title, and without representing the ancestor in his debts. This abuse was obviated, first, by an act of sederunt in 1662, and, thereafter, more compleatly by 1695, cap. 24. But an adjudication upon a trust-bond is, by the enactment, declared to be a mode by which apparent heirs *succeed* to their ancestors, and is viewed in that light by every lawyer who writes upon the subject; Stair, b. 3. tit. 6. p. 14.; Sir George M'Kenzie, tit. Succession in heritable rights; Bankton, b. 3. tit. 5. p. 101. 102.; Erskine, b. 3. tit. 8. p. 172.

The practice of granting trust-bonds, for the purpose of facilitating the transmission of feudal rights, without producing the investitures, and without the consent of the superior, was an early invention of our law. But it would have been a very unavailing one, and little followed, could the superior elude it by the objection here made. And to admit the exception in this competition, would render insecure most of the land-rights in this country, which, at one period or another, have been conveyed by the form which has been adopted in this case.

The Lord Ordinary found, ' That an adjudication upon a trust-bond is a method of making up titles to an estate known and established in the law of Scotland; that it vests an active right in the trustor, and transmits to his heirs.' And to this decision the Lords adhered.

Observed on the bench: Mr Hepburn did not insist to be allowed to redeem upon payment of the sums in the adjudication; neither, in the present case, was it competent, as the legal was expired; and the equity of redemption could not operate in his favour against the representatives of the apparent heir.

Lord Ordinary, *Monboddo*.

Act. *Geo. Wallace*.

Alt. *Geo. Buchan Hepburn*.

C.

No.

No. LXXVII.

July 25. 1781.

*PATRICK M^cQUEEN, Forrester at Abernethy, and his
Wife, JANET M^cGREGOR.*

Against

Mr JOHN GRANT, Minister at Abernethy.

*Jurisdiction.—Clergymen, in the exercise of their ecclesiastical function,
not amenable to a civil court.*

THE pursuers having applied to the defender for tokens of admission to the sacrament, were refused, on account of some depositions emitted by them before the circuit court at Inverness; in which depositions, it was alledged, that they had perjured themselves. The pursuers, upon this, complained to Mr M^cGregor, factor of Sir James Grant, and he wrote to the defender upon the subject. In answer Mr Grant said, that he ‘heard them (the pursuers) charged in face of court with having perjured themselves; that Lord Kennet and Mr Nairne (the depute Advocate) had passed by their evidence altogether; that, by the generality of people, they were censured and condemned in the severest terms; and that, while they were under such scandal, they could not be admitted,’ &c. &c.

Mr M^cGregor then wrote to Mr Nairne, who, in answer, said, he ‘had no impression that the pursuers were guilty of perjury, nor could they appear in that light to Lord Kennet, otherwise he would have committed them to prison; and that it would be exceedingly unjust, if every slight discrepancy of witnesses were to be considered as perjury, or made the ground of ecclesiastical censure,’ &c. &c.

This answer of Mr Nairne’s was transmitted to the defender Mr Grant, and produced a second letter to Mr M^cGregor, in which he, in general, adhered to his former one, and particularly, alledged, that ‘there was a *mala fama* universally against the pursuers, as to this matter; and that their characters could not be cleared without a direct and positive attestation that their evidence was sustained by the court.’

An action of defamation and damages was raised against Mr Grant, and came to be discussed before Lord Kennet Ordinary. His Lordship having heard parties, ordered a special condescendence for the pursuers, upon which, with answers, the following interlocutor was pronounced: ‘Although the Lord Ordinary is of opinion, that, if the defender had no other reasons for refusing to admit the pursuers to par-
‘ take

‘ take of the sacrament of the Lord’s Supper, than on account of the
 ‘ depositions emitted by them in the criminal action mentioned in the
 ‘ condescendence, he acted very improperly ; and from his two letters,
 ‘ both dated in August last, to Mr M’Gregor, it would appear he had
 ‘ no other reason ; yet as, by that refusal, he was acting in his capacity
 ‘ of minister in the parish of Abernethy, he is not, on that account,
 ‘ amenable to the civil courts of law, and therefore finds the condescen-
 ‘ dence not relevant, and assails the defender from this action, and
 ‘ decerns ; but, on account of the impropriety of his conduct, finds
 ‘ him entitled to no expences.’

In a reclaiming petition for the pursuers, it was argued, that office will not sanctify injury ; and, if a man abuses his office for the purpose of injuring his neighbour, he is nevertheless liable in damages for that injury. The *bona fide* execution of an office may be a reason for excusing a man who is guilty of error ; but when it appears that there is no *bona fides* in the matter, on the contrary, that a malicious intention has been at the bottom throughout, office is rather an aggravation than an excuse ; and the presuming, under the pretext of office, to commit an injury, is an offence against the public, as well as against individuals.

Two decisions were also quoted to show that ministers were answerable to a civil court for their behaviour in an ecclesiastical capacity. The one was the process in 1775, at the instance of John, Robert, and David Scotlands, against the Reverend Mr Thomson at Dunfermline, who, in a sermon from the pulpit, had attacked the pursuers as guilty of breach of trust in some election business of the borough ; and the other was a process in 1762, by one Snodgrass and others in Paisley against the Reverend Dr Wotherpoon, for having, in a sermon, represented them as vicious and abandoned people, who had been guilty of an atrocious riot, in ridiculing preachers and preaching, and making a mock celebration of the sacrament, the very night before that ordinance was celebrated in the town. Which sermon was afterwards published with a preface, pointing out the persons against whom it was directed. In both these cases, damages and expences were awarded by the court.

The court were not unanimous in the present case ; but, by a considerable majority, the petition was refused without answers.

A second reclaiming petition was remitted to the Lord Ordinary, in respect the pursuers alledged that Mr Grant had been industrious in propagating the scandal.

Lord Kennet, Ordinary.

A&C. And. Croftie.

Alt. W. Robertson.

D.

N. B. In a case decided 11th August 1780, Robertson *contra* Campbell and Preston, the Lords proceeded upon the same principle as in the present case ; and, as this decision is not collected, it may not be improper here to take notice of the *species facti*.

L 1

At

At a meeting of the kirk-session of Coupar, previous to the dispensation of the sacrament, it was represented that Robertson had been guilty of such immoralities as rendered him unworthy of being admitted to that ordinance. Upon this he was summoned to attend the session; but, having disobeyed the summons, the session immediately came to a resolution, that he was unworthy to be admitted upon that occasion; and their resolution was entered into the minutes.

Robertson raised an action of defamation before the commissary, charging the two ministers, and one of the elders, who composed the session, with having scandalized his character, both in the session-house and out of doors. The defenders declined the commissary's jurisdiction; but their declinature being repelled, they brought the cause before the court of session by advocacy.

In the bill of advocacy, the defenders maintained that they had all along acted in strict conformity to the rules of the church, without any malice against Mr Robertson, and that they could not be liable in any damages for what they did in the proper and legal exercise of that jurisdiction, with which they were by law intrusted. Upon advising the bill with answers, Lord Hailes Ordinary 'remitted to the commissary, with instructions to refuse a proof of what was said or done by the defenders in the kirk-session, or in their collective capacity, but to allow a proof of what they did as individuals.'

Robertson reclaimed; but, upon advising the petition and answers, the Lords unanimously adhered to the Lord Ordinary's interlocutor, and found the respondents entitled to the expences of their answers.

A second reclaiming petition was refused without answers.

No. LXXVIII,

August 2. 1781.

Ranking of the CREDITORS of CULT.

Novatio debiti.

MR WARDROBE of Cult died in 1775, possessed of an estate of about L. 300 Sterling of yearly rent. His debts, constituted chiefly by bill, for small sums, and due to country people, amounted to L. 10,000, besides L. 1000, in name of provisions to his younger children.

His eldest son, Doctor Wardrobe, who had resided for some time in the West Indies, and there purchased an estate, said to be very valuable, came home a few weeks before his death. Although, from the father's books, which were regularly kept, the situation of his funds might have been known; and although the son himself was then insolvent

insolvent for a large sum, he entered into possession of his father's estate, took up the bills granted by his father, and gave his own acceptances in their stead, to the extent of L. 7000.

In 1778, the creditors proceeded to diligence against the estate of Cult; among others, one Mr Rofs from the West Indies adjudged for the sum of L. 15,000 due by the son. The younger children also led adjudications.

In the ranking of the creditors, those in the renewed bills craved to be preferred, in terms of the statute 1661, cap. 24. as creditors of the father.

To this Mr Rofs and the younger children *objected*, That, by the creditors having given up the father's bills, and accepted of others from the son, a *novatio debiti* took place, in consequence of which they ought only to be ranked *pari passu* with the son's creditors.

It was *observed on the bench*, That the son's conduct had been very improper, and that no benefit ought to arise therefrom to his own creditors, or to his father's younger children.

The Lords waved determining the general point, and found, from the whole circumstances of this case, ' that the creditors of William Wardrobe the father, though they gave up their former securities, and renewed the bills with the son, are entitled to the benefit of the act 1661, and to be ranked as the creditors of the father.'

Against this judgment the younger children *reclaimed*, when they endeavoured to remove the specialities alluded to in the interlocutor, and to distinguish their plea from that of Mr Rofs, who was only a creditor to the son. But their petition was refused without answers.

For the creditors in the renewed bills, *Honyman*.
younger children, *Dickson*.

For Mr Rofs, *Henry Erskine*.

For the

C.

No. LXXIX.

August 2. 1781.

DOUGLAS, HERON, and CO.

Against

The BANK of ENGLAND, and others.

Competition.—Creditors cannot be ranked twice for their whole debts, upon the same subject, in consequence of different diligences.

IN the ranking of the creditors of Messrs William and Robert Alexanders, the company of bankers, under the firm of Douglas and Heron claimed to be preferred, in virtue of an heritable bond, upon fundry

fundry parcels of the bankrupts landed estate in Scotland. They likewise claimed to be ranked a second time for their whole debts, in virtue of an adjudication, affecting the subjects, covered by the heritable bond.

To this claim the bank of England, and others, adjudging creditors, opposed the decision 12th July 1769, Ranking of the creditors of Auchinbreeh, Dict. vol. 3. *voc.* Right in security, by which it was found, ' That the heritable creditors-adjudgers, were entitled to be ranked ' upon the funds *pari passu* with the other adjudgers, *only for what remained due* of their accumulated sums, after deduction of what they ' should draw in virtue of their investments.'

The interlocutor of the court in this case was precisely in terms of the above decision.

Ordinary, Justice Clerk.

A&A. Abercrombie.

Alt. Rae, Law, W. Miller.

C.

No. LXXX.

August 3. 1781.

E L I Z A B E T H S P I T T A L, Supplicant.

Summary application, by a substitute in an entail for recording the same in the register of tailzies, incompetent, when the entail is not produced.

THE petitioner set forth, ' That she was a substitute in an entail ' affecting the lands of Leuchat : That this entail, though executed on the 19th December 1678, and the title upon which the ' estate had always been possessed, had never been recorded in the ' register of tailzies,' and concluded ' for service of the petition upon ' James Spittal, the heir in possession, for an order upon him to produce the deed of entail, and for a warrant for recording the same in ' terms of the statute 1685.

The petitioner referred to a decision, Faculty Collection, vol. 2. No. 24. where an application of the same nature was complied with, upon production of a copy of a deed of entail, nowise authenticated.

In this case the court refused the petition as incompetent.

A&A. H. Erskine.

C.

No.

No. LXXXI.

August 9. 1781.

CHARLES STEWART, Prisoner,

Against

HENRY M'GLASHAN, one of his creditors.

Cessio bonorum.—*This privilege not competent to debtors incarcerated for damages.*

THE Lords refused liberation upon a *cessio bonorum* to a debtor who was imprisoned for not payment of a sum awarded by the following decree of the court in a former process of wrongous imprisonment, oppression, and damages: 'Find it proved, that the defender, Charles Stewart, acted illegally, unwarrantably, and oppressively, by maltreating Henry M'Glashan, pursuer, under pretence of having enlisted him as a soldier, and procuring him to be confined as a prisoner in the tolbooth of the Canongate, from Saturday till Wednesday, under the aforesaid pretence, without order of law; and, therefore, find the said defender liable to the pursuer in damages and expences.'

Act. H. Erskine,

Alt. J. Morthland.

Clerk, Menzies.

D.

No. LXXXII.

August 9. 1781.

Ranking of HAMILTON of Provenhall's creditors.

Hypothec.—*A writer's hypothec on the papers of a bankrupt, preferable to another creditor's infestment on his lands, though prior in date to the writer's accompt.*

IN the ranking of Provenhall's creditors, William Wilson writer to the signet, produced an interest founded on an accompt of business done for the common debtor, and craved a *primo loco* preference, in virtue of his right of hypothec on the papers which were still in his hands.

M m

It

It was at first objected, that Mr Wilson had passed from his right of hypothec, by taking a bill for the sum in his accompt. But this objection being over-ruled by the Lord Hailes Ordinary, William Jamieson, an heritable creditor, reclaimed upon a different ground, viz. that his debt was completed by infestment, prior to every article in Mr Wilson's accompt of business.

Pleaded for Mr Jamieson: That, by an heritable bond, not only the lands of the debtor, but the title-deeds of those lands, are conveyed to the creditor, and both became equally his property to the effect of securing him against every new contraction of the proprietor. Tho', therefore, an agent is entitled to retain papers in his hands till paid his accompt, in a question with either the proprietor himself, or even a personal creditor, yet he cannot be preferred, or even come in *pari passu*, in ranking with an heritable creditor, who had previously a real lien upon the papers. Besides, Mr Wilson's claim is inconsistent with the security of real creditors, who always understand that no right which does not appear on record can interfere with them.

Answered for Mr Wilson: That, by the law of Scotland, title-deeds or other writings in the custody of an agent, are held to be pledged in security of his accompt; nor can an agent be obliged to give up his hypothec without payment, any more than a wadsetter can be obliged to renounce his wadset, without payment of the redemption-money. Both are redeemable rights, and both are equally inviolable till payment. As to the conveyance of writs and evidents in an heritable bond, it constitutes no real lien whatsoever, but merely a personal right to make them forthcoming from the debtor. Possession of the *ipsa corpora* is the only lien upon title-deeds; and when it is observed that lands and the title-deeds of lands are really two different subjects, it will be evident that the custodier of the deeds has, by possession, as complete and distinct a right in that subject, as the creditor has in the lands by his infestment. With regard to creditors trusting only to the faith of the records, it is by no means the fact as to matters of this kind; nor can it be, for the record does not inform the creditor where his debtor's papers are to be found, or how much of his agent's accompt is unpaid. A creditor need never be long at a loss in these matters; and a very little degree of attention may secure him against any danger; but, on the other hand, if an agent were always to make searches before he could safely proceed to business, it would either oblige every man to be his own agent, or put an end to business altogether.

Cases quoted by Mr Wilson,—Nasmyth *contra* creditors of Lidderdale of Torrs, 6th July 1749; Patrick M'Dougal *contra* creditors of Castlewine, January 1780; Mr Wilson himself *contra* creditors of Lainshaw, July 1780.

‘ The Lords preferred Mr Wilson.’

Lord Hailes Ordinary.

Ast. H. Erskine.

Alt. Moribland.

Clerk, Orme.

D.

No.

No. LXXXIII.

August 10. 1781.

G E O R G E B U C H A N of Kello, Esq.

Against

T H O M A S N I S B E T, and others, creditors of James
Bogue tenant in Kello.*Hypothec.—The landlord's right not affected by a sequestration at the in-
stance of creditors.*

MR BUCHAN having obtained a sequestration of Brogue's crop and stocking, a general sequestration of his personal estate was afterwards obtained by the creditors upon act 12th Geo. III. Upon this a competition took place, and Mr Buchan applied by summary petition to the court, praying ' to find that the subjects sequestrated by ' the sheriff, for security of the landlord's hypothec, are not affected by ' the sequestration awarded by the court, nor fall under the manage- ' ment of their factor ; and that the landlord is at liberty to proceed ' under the sequestration of the sheriff, leaving it to the factor to be ' heard before the sheriff upon any other competent ground.'

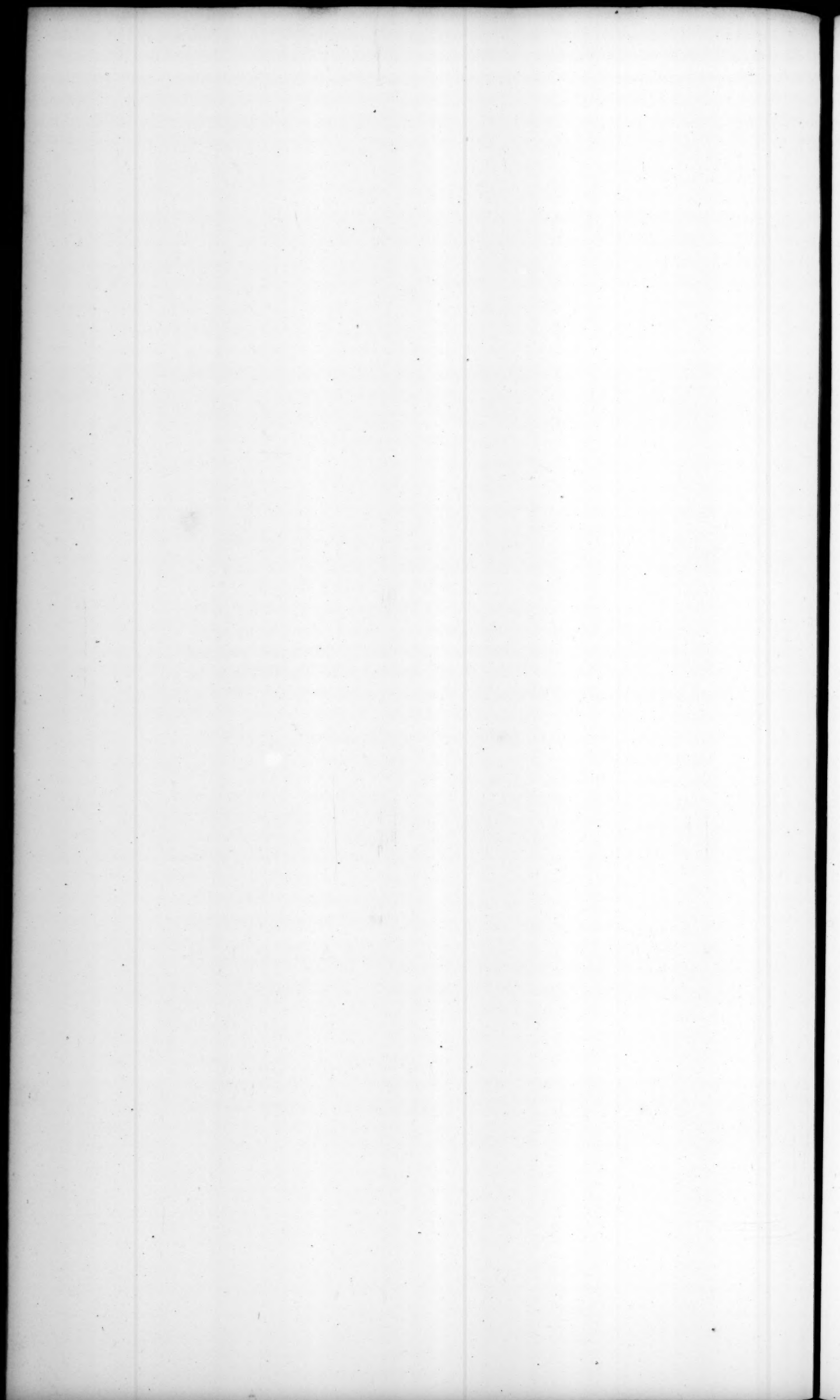
The Lords, upon advising the petition with answers, granted the prayer of the petition.

Act. G. B. Hepburn.

Alt. H. Erskine.

D.

A P P E N.



A P P E N D I X.

No. LXXXIV.

August 4. 1779.

M I L L I G A N,

Against

The HERITORS of Kirkden.*

Teind.—No new augmentation to be given in cases where one had been obtained since the Union.

MR MILLIGAN having brought an action of augmentation against the heritors of Kirkden, the Lords, in their character of Commissioners of Teinds, in respect of the rule of Court, that no new augmentation should be granted in parishes where one had been obtained since the Union, pronounced a judgment affoilzieing the defenders.

Act. Robertson.

Alt. Hay Campbell.

C.

No. LXXXV.

January 30. 1781.

V O L K E R T H E N D R I C K S,

Against

WILLIAM CUNNINGHAM, and others.

Prize.—A neutral ship, carrying the produce of an island at war with Britain, considered as the ship of the enemy.

THE ship Catharina of Holland, Volkert Hendricks master, having been loaded at St Domingo with the produce of that island, was, in her voyage to the Texel, seized by the Bellona, a private ship of war, belonging to William Cunningham and others, and carried into Clyde.

An action having been brought by the captors before the High Court of Admiralty in Scotland, for having the ship and cargo condemned as lawful prize, a judicial acknowledgment was emitted by Mr Hendricks, that the cargo was the produce of St Domingo; and

* This case deserves notice, only on account of the circumstances attending it in the House of Lords. It having been carried there by appeal, the heritors contended, that the Lords in the Court of Session, acting in questions of this sort by special authority from the legislature, and as a committee of Parliament, their decisions were not subject to review. For the interlocutor of the House of Lords on this point, see Abstract of appeal Cases, p. 150. B.

on that account sentence of condemnation was passed. This action was removed into the Court of Session, which sustained the Admiral's judgment *.

Lord Ordinary, *Braxfield*.
Alt. Lord Advocate.

For Hendricks, *Maclaurin, Morthland*.

C.

No. LXXXVI.

February 17. 1781.

C A M P B E L L,

Against

S L O A N - L A U R I E.

Member of parliament.—Jus tertii.

MR CAMPBELL held sundry lands under one tenure, comprehending the two-merk land of Horsecleugh, of the Earl of Dumfries, who conveyed the liferent superiority of this pendicle to Mr Sloan Laurie, for the purpose of creating a freehold-qualification.

At the meeting for electing a member of parliament for the county of Ayr in 1780, Mr Sloan Laurie exhibited his claim to be enrolled. It was opposed by Mr Campbell, the vassal, a freeholder; who alleged, that the conveyance on which it was founded, tending to an undue multiplication of superiors, was void and null, by way of exception, and without the aid of reduction or declarator; Stair, b. 2. tit. 4. § 5.; Bankton, b. 2. tit. 4. § 8.; February 17. 1761, Douglas of Kelhead: that he had never recognised the claimant as his superior, and in evidence of his fixed purpose never to do so, had already commenced a suit for declaring the inefficacy of the grantee's right: so that no possession either had followed, or could follow upon it.

This challenge was brought under review of the Court of Session.

Observed on the bench: The multiplication of superiors, without the consent of the vassal, is unquestionably illegal. Still, however, a grant of superiority having that effect, may be valid, if not reduced by the vassal. It may even be secured against reduction, by the grantee's acquiring right to the superiority which remains with his author. It is therefore *jus tertii* in the freeholders to canvass this circumstance in the claimant's right.

'The Lords repelled the objection.'

For the objector, *Wight, Rolland*.

C.

* It may be proper to notice here, that these judgments were brought by appeal under review of the House of Lords, by whom they were reversed; the principle on which they proceeded, although adhered to in the war which ended in 1763, having been departed from in that terminated in 1782. The learned Lord who moved for the reversal, at the same time expressed his opinion, that the High Court of Admiralty in Scotland had no jurisdiction in the condemnation of prizes. For the Interlocutor of the House of Lords, see Abstract of Appeal Cases.

No. LXXXVII.

June 27. 1780.

JUSTICIARY-COURT.

JOHN KELLY,

Against

JOHN SMITH.

Game.—The only qualification now subsisting, for the killing of game, is that of a plough-gate of land in heritage, by act 1621.

A COMPLAINT was presented to the justices of the peace for Ayrshire, in the name of Kelly, huntsman to a gentleman of that county, against Mr Smith, an officer in the army, and proprietor of a small estate in the same county, setting forth, that the latter had incurred the penalties and forfeitures of the statute, the 13th of his present Majesty, entitled, ‘ An act for the more effectual preservation of the game in that part of Great Britain called Scotland,’ and enacting, ‘ That every person whatsoever, not qualified to kill game in Scotland, who shall have in his or their custody, or carry at any time in the year, upon any pretence whatever, any hares, partridges, pheasants, moor-fowl, ptarmigan, heath-fowl, snipe, or quail, without the leave or order of a person qualified to kill game in Scotland, for carrying such hares or other game, and for having the same in his or their custody, he shall for the first offence forfeit and pay the sum of 20 s. and for every other subsequent offence the sum of 30 s. Sterling.’

The justices having on this statute given sentence against Smith, he appealed from their judgment to the ensuing circuit-court of justiciary for the district. The judge, however, on that circuit *, considering the question as unprecedented before the supreme court, certified it to the High Court of Justiciary at Edinburgh; who ordered, that the cause should be pleaded in their presence; and afterwards that the argument upon it should be stated in informations.

Kelly, who was respondent in the appeal, enforced his complaint in the following manner: The maxim of the Roman law, *Res nullius cedunt occupanti*, is not received in this nor in any other country where the feudal system has prevailed. By that constitution, there can exist no *res nullius* within the territory of a state; its maxim being, that such things as otherwise would be *res nullius*, become the property of the Sovereign; *Res nullius sunt Domini Regis*; *Consuet. Feud. lib. 2.*; *Reg. Mag. lib. 4.* Hence, in particular, game of all kinds are *inter regalia*: For as, by the Roman law, they were *res nullius*, so neither

* Lord Hailes.

under

under the feudal governments was it ever understood that the right to them could be comprehended in the private property of lands. Having then no other proprietor, they necessarily *cedunt Domino Regi*.—This rule being derived to us from a source which is common to almost all the states of Europe, is, with respect to Saxony, supported by the authority of Struvius, in his *Syntagma, ad tit. D. de A. R. D.*; of Voet. *ad eund. tit.* as to Holland; and of Burn, vol. 1. tit. Game, p. 218; and Blackstone, vol. 2. p. 413. 415. 418. respecting England. The *Leges Forest.* cap. 17. § 2. shew the prevalence of the principle in Scotland; and hence have proceeded the many interpositions of our legislature in regulating the game, such as, Stat. Rob. III. c. 10.;—1424, c. 36.; 1457, c. 88.; 1474, c. 60.—68.

In this manner it is evident that, without a special right or *qualification* flowing from the Sovereign or State, no man is entitled to kill game in this country, notwithstanding his being possessed of land-property.

Our legislature from time to time have granted such qualifications by general laws; but the only one which now subsists is that introduced by act 1685, c. 20. and thus expressed: ‘Considering that setting-dogs, and other engines for killing of fowl, is a great cause of the scarcity of game, we do hereby prohibit and discharge all persons to have or use setting-dogs, unless he be an heritor of L. 1000 of valued rent, and have the express licence of the masters of our game within their several bounds, under the pain of 500 merks *toties quoties*, in case of failzie: And we do hereby discharge all common fowlers, and shooters of fowls, or any other persons, except they be domestic servants to noblemen or gentlemen who are heritors of L. 1000 of valued rent, to have or make use of setting-dogs or fowling-pieces, under the pain of escheat of such dogs or guns, and imprisonment of their persons for the space of six weeks, *toties quoties*.’ This enactment evidently repeals the act 1621, if that statute be understood as importing any qualification.

Answered by the appellant: It does not appear that the maxim of the feudal law now referred to was ever, in this country particularly, applicable to game. Foreign authorities are resorted to in vain, while our own are express against that idea; Craig, *lib. 1. dieg.* 16. § 38.; Stair, b. 2. tit. 3. § 69. If that maxim could be applied to hunting, it would certainly be no less applicable to fishing. But why then are salmon-fishings alone *inter regalia*? If it applied to hunting, why is the right of killing swans in particular noticed by Lord Stair as a *regale*? and why by our old law were those severe penalties, mentioned in the *Leges Forestarum*, confined to the killing of deer? Indeed, in that antient Collection, cap. 17. the otherwise unlimited right of hunting is explicitly acknowledged.

The idea therefore of the several qualifications required by the legislature for exercising this common right, as if they were of the nature of special or peculiar grants, is plainly erroneous. They are truly regulations of public police, introduced for the general benefit of the community; and the only question now to be determined is, whether those of the act 1621, or those of 1685, are at this day in observance? Prior to the year 1600, our legislature, by various enactments, regulated indeed the manner in which the right of killing game was to be exercised,

exercised, but made no distinction of persons, as entitled or not entitled to that favourite sport. The act, cap. 23. of that year, excluded from it 'sik as by their revenues could not bear the chargings and burdings of the hawks, hounds, and dogs, requisite in sik pastymes.' And in the same spirit the statute 1621, c. 31. proceeded to reduce this indefinite description to a more precise and determinate standard, by ordaining, 'That na man hunt nor haulk at any time hereafter, who hath not a plough of land in heritage, under the pain of one hundred pounds.'

Nor can the act 1685 be set in opposition to this statute. That temporary enactment, for its endurance seems to have been limited to seven years, required not only the qualification of L. 1000, but a licence from the masters of the game. These masters of the game have long since ceased to exist; nor have any others been appointed in their stead; and therefore, as it will be acknowledged that this law has either wholly preserved or wholly lost its authority, it follows, that the latter is the truth; its regulations so far being evidently nugatory.—Accordingly the statute 1707, c. 5. prohibits only a common fowler, to hunt on any ground when he has not a subscribed warrant from the proprietor of the ground, without distinguishing the extent of the property or qualification 'of any nobleman or heritor' who is such proprietor; only it is to be presumed, that by the term *heritor*, according to the sense of the act 1621, is there meant a person possessed of a ploughgate of land in heritage.

The judgment of the Court was, 'That by the common law of Scotland all men have right and privilege of the game on their own estates or property: that by the act 1621 this right and privilege, or qualification, was confined to persons who had a ploughgate of land or more of property: that the act 1685 ratified and confirmed the general rule laid down in the said act 1621, but introduced a new regulation respecting the particular mode of hunting with fowling-pieces and setting-dogs, under an exception to those possessed of L. 1000 Scots of valuation, and having licence from the masters of the game: that no evidence had been laid before the Court of the said regulation and exemption ever having been in observance since the Union, and that they are now in desuetude: That the appellant having more than a ploughgate of land in property, had a right, and was qualified by the law of Scotland, to hunt, subject to all regulations of the game: That he was not liable to the fines imposed by the act of the 13th of his present Majesty: And therefore they reversed the decree of the justices of the peace appealed from; but, in respect of the circumstances of the case, found no expences due.'

For appellant, *Blair, R. Dundas*.

For respondent, *G. Fergusson, H. Erskine, Tait*.

S.

O o

ABSTRACT

A B S T R A C T

OF THE

JUDGMENTS of the HOUSE of LORDS,

IN THE

CASES contained in this VOLUME

No. VI.

March 30. 1778.

T A I T

Against

G E O R G E S K E N E - K E I T H.

‘ ORDERED and *adjudged*, That the appeal be dismissed, and the
‘ interlocutors complained of affirmed.’

No. VII.

March 10. 1779.

L A D Y C R A W F U R D,

Against

M A R Y L O C K H A R T.

‘ ORDERED and *adjudged*, That the appeal be dismissed, and the
‘ interlocutors complained of affirmed.’

No. XXVIII.

April 16. 1779.

D r F O R D Y C E,

Against

York-Buildings Company's C R E D I T O R S.

‘ ORDERED and *adjudged*, That the appeal be dismissed, and the
‘ interlocutors complained of affirmed.’

No. XXIX.

No. XXIX.

April 15. 1779.

York-Buildings Company's CREDITORS,

Against

S T E W A R T T H R E I P L A N D.

' ORDERED and *adjudged*, That the interlocutors complained of
' be reversed, and the defender assolzied.'

No. XLVIII.

March 10. 1779.

J A C K S O N,

Against

Procurator-fiscal of the A D M I R A L T Y.

' ORDERED and *adjudged*, That the appeal be dismissed, and the
' interlocutor complained of affirmed.'

No. LIV.

February 21. 1780

E A R L of A B E R C O R N,

Against

H O P E and W A U C H O P E.

' ORDERED and *adjudged*, That the Cases be remitted back to
' the Court of Session in Scotland, with liberty to each party to re-
' claim and amend the process, as he shall be advised ; and with par-
' ticular directions to the said Court, to enquire respecting the commu-
' nications of the level in question.

No. LXIV.

December 14. 1779.

Sir L A U R E N C E D U N D A S,

Against

H O N Y M A N, and others.

' ORDERED and *adjudged*, That the appeal be dismissed, and the
' interlocutors complained of affirmed.'

No.

No. LXVIII.

March 8. 1780.

S I N C L A I R,

Against

Magistrates of D Y S A R T.

‘ *ORDERED* and *adjudged*, That the appeal be dismissed, and the
‘ interlocutors complained of (viz. those of February and March 1779)
‘ be affirmed.’

No. LXXIV.

February 25. 1780.

D A V I D O R M E,

Against

L E S L I E.

‘ *ORDERED* and *adjudged*, That the appeal be dismissed, and the
‘ interlocutors complained of affirmed.’

No. LXXVIII.

March 17. 1780.

E L I Z A B E T H, &c. G R A H A M S,

Against

M A R G A R E T G R A H A M.

‘ *ORDERED* and *adjudged*, That the appeal be dismissed, and the
‘ interlocutors complained of affirmed.’

No. CXVIII.

May 15. 1781.

J A N E T A L L A N,

Against

C R E D I T O R S *of* C A M E R O N.

‘ *ORDERED* and *adjudged*, That the appeal be dismissed, and the
‘ interlocutor complained of affirmed.’

No.

No. X. B.

May 5. 1780.

M A R S H A L L,

Against

C U N N I N G H A M, D O U G A L, and C O.

‘ ORDERED and *adjudged*, That the appeal be dismissed, and the
‘ interlocutors complained of affirmed.’

No. XXI. B.

April 17. 1782.

H E N R Y E R S K I N E,

Against

J A M E S F E R R I E R.

‘ ORDERED and *adjudged*, That the appeal be dismissed, and the
‘ interlocutor complained of reversed; *and* it is declared, that the ap-
‘ pellant was entitled, in virtue of his titles, to be enrolled on the roll
‘ of freeholders for the county of Dumbarton.’

No. XXV. B.

February 19. 1782.

D U K E of M O N T R O S E,

Against

Sir J A M E S C O L Q U H O U N.

‘ ORDERED and *adjudged*, That the appeal be dismissed, and the
‘ interlocutors complained of affirmed.’

No. LII. B.

February 20. 1782.

Sir J A M E S G R A N T,

Against

D U K E of G O R D O N.

‘ ORDERED and *adjudged*, That the appeal be dismissed, and the
‘ interlocutors complained of affirmed.’

P p

No.

No. LXI. B.

March 13. 1782.

J O H N T H O M S O N,

Against

G E O R G E B U C H A N A N,

‘ *ORDERED* and *adjudged*, That the interlocutors complained of
‘ be reversed, and that the decret of the Judge-Admiral in Scotland be
‘ affirmed.’

No. LXVI. B.

April 22. 1782.

W A U C H O P E,

Against

YORK-BUILDINGS COMPANY.

‘ *ORDERED* and *adjudged*, That the appeal be dismissed, and the
‘ interlocutors complained of affirmed with L. 100 costs.’

No. LXXXIV. B.

May 19. 1783.

M I L L I G A N,

Against

The H E R I T O R S of Kirkden.

Counsel were called in to be heard in this cause; and the counsel
were directed to make out, Whether this House hath any appellant
jurisdiction from a judgment of the Lords of Session acting as Com-
missioners of Teinds? And the counsel desiring time to prepare them-
selves for the above purpose,

‘ *ORDERED*, That the hearing of this cause be put off till next
‘ session, with liberty to bring new cases, if they shall be so advi-
‘ fed.’

No.

No. LXXXV. B.

May 20. 1783.

H E N D R I C K S,

Against

C U N N I N G H A M.

After hearing counsel, as well yesterday as this day, upon the amended petition and appeal of Volkert Hendricks, master of the ship Catharina of Amsterdam, and the other owners of the said ship and cargo, complaining of two interlocutors of the Judge of the Court of Admiralty in Scotland, and also of two interlocutors of the Lords of Session there; and praying, that the same might be reversed, varied, or altered, or that the appellants might have such other relief in the premises as to this House, in their Lordships great wisdom, should seem meet: as also, upon the answer of William Cunningham and other owners of the Bellona private ship of war, and James Maclean, the commander, put into the said appeal, and due consideration had of what was offered on either side in this cause, *and the appellants having waved any objection to the regularity of the proceedings, or to the competence of the jurisdiction,*

‘ ORDERED and adjudged, That the said several interlocutors, complained of in the said appeal, be, and the same are hereby, reversed.’

I N D E X



I N D E X

OF THE

PURSUERS and DEFENDERS Names in the foregoing Decisions.

Letter B. refers to the last part of the Decisions, beginning December 5. 1780.

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Anderson	Kirk-sec. of Kirkwall, &c.	93 52	Douglas, Heron, and Co. Hair	57 34	
Anderson	Morton and Alexander	176 91	Douglas, Heron, and Co. England (Bank of) &c.	B. 135 79	
Anstruthers	Roches (Countess of)	178 93	Dundas	Ferguson	221 120
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Ayr (magistrates of)	Macadam	206 110	Dundas	Officers of State, &c.	116 64
			Dunlop, &c.	Spiers, &c.	124 66
			Lymock	Duke of Montrose	136 72
B					
Baird	Don	165 85	E		
Ballardie and others	Bisset and others	B. 52 27	Edinburgh (magistrates of)	B. 68 38	
Barns	Hamilton	E. 1 1	Edinbur. master tailors of	Journeymen tailors	64 37
Bartholomew and others	Chambers	25 12	Edmonstone	Jackson	195 103
Bell	Lochmaben (mag. of)	B. 93 53	Elbank (Lord)	Hay	193 101
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Bethune	Jarvice	20 9	Erikine	Manderfon	189 93
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Blackie	Robertson	B. 90 51	Ferguson	Campbell	B. 16 8
Bogle	Yule	69 40	Ferrier	Erskine	B. 42 21
Bolton &c.	Horseburgh	B. 56 32	Ferrier	Graham	B. 86 48
Brown	Brown	106 59	Finlay	Birkmire	173 89
Brown	Hamilton	B. 3 3	Fisher's Creditors	Campbell's creditors, &c.	87 49
Buchan	Nisbet	B. 139 83	Fletcher	Ferrier	B. 37 19
Buchanan	Hunter-Blair, &c.	166 86	Foggo and others	Macadam and others	B. 22 12
Burn	Adam	132 70	Foot and Marshall	Stewart	77 44
Burnet	Ritchie	23 11	Freeland and others	Glasgow (weavers of)	19 8
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Butchart and others	Mudie and others	B. 94 54	Fullerton	Richmond	183 95
C					
Campbell	Macgibbon	230 125	G		
Campbell and others	Semmerville and others	29 16	Gardiner	Spalding	177 92
Campbell	Fleming	B. 43 22	Gerran	Alexander	B. 96 56
Campbell	Scotland	80 46	Good	Smith	138 82
Campbell	York-build. Co. (cred. of)	200 106	Gordon	Gordon	B. 72 40
Campbell	Sloan Laurie	B. 142 86	Gordon	Milne	205 109
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Chalmer	Napier	59 35	Graham	Graham	122 65
Christian	Syme	149 77	Grant and others	Gordon (Duke of)	B. 90 52
Clarke	Rofs	100 56	Grant and others	Gordon (Duke of)	54 33
Clark	Robertson and others	B. 119 71	Grant	Donaldson	98 55
Coldinghame (heritors of)	Dunfe (heritors of)	172 88	Grant	Mansfield, Ramfay, & Co.	180 94
Colebrooke and Company	Douglafs	217 117	Gray	Dunfries magistrates	B. 12 6
Collins	Admiralty (Judge of)	B. 70 39	Greig	Reid and others	B. 97 57
Craufurd (Lady)	Lockhart	14 7	Grierfon	Ewart	39 24
Crooks	Tawfe	113 62	Grierfon	King	B. 111 63
Cult creditors (ranking of)		B. 134 78	Grierfon	Ramfay	203 103
Cuning	Garden	B. 50 28	H		
Cunningham, Dougal & Co	Marshall	B. 23 13	Haddington (F. of)	Officers of State	40 25
Cunningham Dougal & Co	Marshall	220 119	Haddington W. manufact.	Gray	B. 34 18
Cuthbertson	Thomson and Young	B. 76 24	Haldane	Trall	B. 55 30
D					
Dalrymple and others	Stodart and others	75 43	Halkerton	Wedderburn	B. 105 65
Dalrymple and others	Farquhar-Gray	B. 82 46	Hamilton	Gilbons	B. 98 60
Davidson	Elcherion	1 1	Hamilton	Cathart	B. 80 44
Dewar	Aitken	225 122	Hay and Low	Williamson	215 116
Dickson	Watson	127 67	Hay	Williamson	81 47
Dickson	Dickson	B. 10 5	Henderfon	Maclean and others	4 2
			Hendricks	Cunningham	B. 141 85
			Hepburn	Scotts	B. 130 76
				Q q	Hepburn

I N D E X.

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Hill	Hopkirk and Maccall	187 97			
Home	Woods	B. 102 63			
Hope	Wauchope	96 54			
Houston	Ferrier	B. 39 20			
Hunter-Blair, &c.	Phin	B. 44 23			
I					
Innes	Clerk	B. 21 11			
Jackson	Ure	154 80			
Jollie	Stevenfon	B. 127 73			
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Kelly	Smith	B. 143 87			
Kempt	Watt	110 61			
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An heir of entail not entitled to claim aliment from the widow of the entailor, whose annuity, secured to her by marriage-contract, exhausted the whole produce of the estate. No. 112. p. 209. *Stewart against Campbell, June 24. 1780.*

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BENEFICIUM COMPETENTIAE. *Beneficium competentiae* not allowed to a person having obtained a *cessio bonorum*. No. 31. p. 52. *Reid against Donaldson, July 11. 1778.*

BILL OF EXCHANGE. A bill and protest found to be a virtual assignation of a draught previously in the drawee's hands, of which the term of payment was not come. No. 53. p. 94. *Macleod against Crichton, Jan. 14. 1779.*

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R r share

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An exclusive privilege to carry on the webster craft, to reach silk-weaving, although not in use at the time of the grant. No. 8. p. 19. *Freeland against the Incorporation of Weavers in Glasgow, Jan. 29. 1778.*

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C

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CAUTIONER. Diligence being done within the seven years, a cautioner, in terms of act 1695, is however not liable for annualrents that are posterior. No. 105. p. 199. *Reid, &c. against Maxwell, Feb. 17. 1780.*

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CLAUSE. It being provided in a contract with mariners, 'that they should not be entitled to their wages, or any part thereof, till the return of the ship to the port from whence she set sail,' the mariners have right thereto, although the ship never returned, but was wrecked. No. 10. p. 22. *Morison and others against Hamilton and others, Feb. 10. 1778.*

A legacy bequeathed 'to one in liferent, and her children in fee,' imports a fee in the children, descendible, upon their outliving the testator, to their next of kin. No. 38. p. 66. *Turnbull against Turnbull and others, July 28. 1778.*

Clause prohibiting an heir of entail 'from altering the succession, or doing any deed directly or indirectly, whereby the same might be any wise altered,' does not prevent a wife from making an exorbitant settlement on her husband. No. 42. p. 73. *Sir W. Montgomery-Cunningham against J. Montgomery-Beaumont, Aug. 5. 1778.*

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A father, for the price of some heritable subjects which had belonged to him, took a bond 'in favour of himself and his wife, and longest liver of them two in liferent, and for their liferent-use alienably, and in favour of his son, his heirs, executors, and assignees; without prejudice to the father of suiting and using all manner of execution and diligence at any time during his life, and uplifting and discharging the principal sum, annuallrent, and penalty, notwithstanding he was only provided to the liferent.' The Lords found, that the fee of this bond was in the father, and made part of his executry. No. 5. p. 10. *B. Dickson against Dickson, Dec. 7. 1780.*

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COMPETITION. Creditors cannot be ranked twice for their whole debts upon the same subject, in consequence of different diligences. No. 89. p. 135. *B. Douglas, Heron, and Company against Bank of England, Aug. 2. 1781.*

A disposition in security, and assignation to the rents of lands, followed by infestment, preferable to an arrestment of these rents. No. 114.

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CONDUCTIO INDEBITI. This action competent to a cautioner in a bond falling under the statute 1695, cap. 5. *anent principals and cautioners*, who had, after the lapse of the seven years, made payment of the debt. No. 41. p. 70. *Carrick against Carse*, Aug. 5. 1778.

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CREDITORS OF A DEFUNCT. The nearest of kin having confirmed, a creditor of the defunct claiming upwards of two years afterwards, preferred to the executor's creditors. No. 69. p. 129. *Tate against Kay*, February 12. 1779.

D

DEATHBED. Apparenacy of an heir of tailzie entitles to pursue reduction *ex capite lecti*. No. 65. p. 122. *Grabam against Grabam*, Feb. 4. 1779.

A deed, by which the heirs at law were excluded, having been cancelled, they were found entitled to sue a reduction *ex capite lecti* of another deed of the same tendency, though once barred by the prior. No. 89. p. 173. *Finlay against Birkmire*, July 29. 1779.

DEBTOR AND CREDITOR. A catholic creditor having obtained payment out of the estate of his debtor, is not obliged to assign to the postponed creditors on that estate his right of action against a cautioner. No. 95. p. 178. *Grant against Mansfield, Ramsay, and Company*, Dec. 9. 1779.

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F

FACTOR. Factor appointed by the Court of Session cannot enter into a submission. No. 30. p. 49. *Creditors of Patrick Macdowal against Charles Macdowal*, July 8. 1778.

FIAR. See Clause.

Absolute, limited. A father having in his marriage-contract become bound to provide his estate to the eldest son, although he may settle rational provisions on his younger children, yet cannot, to the prejudice of his son or his creditors, dispose the estate with a reservation of the son's liferent to his son's children. No. 36. p. 62. *Spier and others against Dunlop and others*.

FOREIGN. Succession to the moveable estate of a Scotsman situated in a foreign country regulated by the law of the country. No. 1. p. 1. *Davidson against Elcherfon*, Jan. 13. 1778.

Succession in effects recovered in a foreign country, under a will executed there, regulated by the law of that country. No. 2. p. 4. *Henderson against Maclean*, Jun. 13. 1778.

The annualrent of a debt contracted abroad, and sued for in this country, is to be restricted to the legal rate of interest here, though smaller than in the foreign state. No. 79. p. 153. *Wood against Granger*, June 24. 1779.

FORUM COMPETENS. Bank-notes being considered as cash, transmitted in succession like other moveable effects. No. 1. p. 1. *Davidson against Elcherfon*, Jan. 13. 1778.

G

GAME. The only subsisting qualification for the killing of game, is that of a ploughgate of land in heritage, by act 1621. No. 87. p. 143. B. *Kelly against Smith*, June 27. 1780.

Hunting within the inclosures of another against his will not lawful. No. 17. p. 30. *Marquis of Tweeddale against Dalrymple and others*, March 3. 1778.

GLEBE. The state of lands, whether arable or not, to be determined by their present condition. No. 24. p. 39. *Grierfon against Ewart*, June 26. 1778.

By arable lands are to be understood those which are in a continued state of cultivation, though bearing crops of grass and not constantly under the plough. *Ibid.*

A minister in a royal burgh having a landward territory annexed to it, has right to a glebe, there being church-lands within the

the parish. No. 95. p. 183. *Fullerton against Richmond*, Dec. 17. 1779.

A minister not entitled to fuel, except through immemorial usage. No. 72. p. 136. *Dymock against Duke of Montrose*, Feb. 25. 1779.

H

HERITABLE AND MOVEABLE. How far a power of attorney for doing 'all things relative to the premises,' authorises an alteration of them from heritable to moveable. No. 59. p. 106. *Brown against Brown*, Jan. 26. 1779.

HERITAGE AND CONQUEST. Conquest lands being sold, *jus representationis* takes place upon the price. No. 75. p. 147. *Russel against Russel* March 9. 1779.

HOMOLOGATION. Silence of a merchant to whom goods have been sent, contrarily to the commission given by him, imports his homologation of the sender's proceedings. No. 90. p. 175. *Lombe against Scott*, Nov. 17. 1779.

See *Writ*, No. 74.

HUSBAND AND WIFE. A disposition by a husband to himself and his wife in conjunct fee and liferent, and to their children in fee, granted after marriage, rendered void by the death of the husband within a year after marriage, without a child being born, no proper marriage-contract having intervened. No. 28. p. 50. B. *Cuming against Garden*, Feb. 7. 1781.

Money being advanced for aliment of a family, and a voucher taken for it from the husband, the creditor has no claim against the wife, although she succeed to a separate estate, No. 9. p. 17. B. *Mitchellson against Lady Cranston*, Dec. 12. 1780.

HYPOTHEC. The hypothec competent to a writer on the writings of his employer does not stop the triennial prescription. No. 12. p. 22. B. *Foggo against Macadam*, Dec. 22. 1780.

A writer in consequence of his hypothec upon his employer's writings, is preferable to the heritable creditors of the bankrupt, although the security of the latter be prior in date to the writer's account. No. 82. p. 137. B. *Ranking of Provenhall*, Aug. 9. 1781.

The hypothec competent to a landlord, is not affected by a sequestration of the tenant's effects under the bankrupt-act. No. 83. p. 139. B. *Buchan against Nisbet*, Aug. 10. 1781.

No right of hypothec competent to a writer on the title-deeds of an estate for an account due by the apparent heir thereof. No. 45. p. 79. *Orme against Barclay, &c.* Nov. 18. 1778.

Hypothec on the stocking of a farm entitles the landlord to recover from a creditor of the tenant any part of it carried off by poiding. No. 37. p. 67. B. *Macdowal against Jamieson*, Feb. 15. 1781.

I

IMPLIED CONDITION. Where mariners are engaged in a voyage for several different ports, and the ship is wrecked, they are entitled to wages only to that period when the ship

was unloaded at the last port before the wreck happened. No. 10. p. 22. *Morison and others against Hamilton and others*, Feb. 10. 1778.

IMPRESS-OFFICER. Impress-officer may impress the master and mate of a smuggling vessel of any size. No. 17. p. 32. B. *Napier against Brownings*, Jan. 19. 1781.

IMPROBATION. The titles of a person who makes a production as sufficient to exclude, must be altogether unexceptionable, otherwise the action of reduction improbation must take its ordinary course. No. 72. p. 122. B. *Sinclair against Sinclair*, July 4. 1781.

INDEFINITE PAYMENT. Partial payments of an account made during the last three years to be applied to the earliest of the preceding articles not then prescribed. No. 82. p. 158. *Good against Smith*, June 30. 1779.

INHIBITION. Inhibition not sufficient to secure a right in lands against the granting of tacks. No. 109. p. 205. *Gordon against Milne*, Feb. 29. 1780.

A party became bankrupt, after having entered into a minute of sale concerning a landed estate, by which the seller agreed to take his personal bond for a part of the price. He then granted security on the lands for the whole price. A creditor of his having used inhibition after the minute of sale, but before the sale was completed, the Lords found, that the real security granted by him was not struck at by the inhibition. No. 94. p. 180. *Grant against Mansfield, Ramsay, and Company*, Dec. 9. 1779.

INNOVATION. Whether a *novatio debiti* is created by a creditor of an ancestor taking bills from the heir, debated but not decided. No. 88. p. 134. B. *Ranking of creditors of Culh*, Aug. 2. 1781.

An heritable security applicable to certain bills, held to continue applicable to other bills afterwards substituted in the place of the former. No. 41. p. 72. B. *Bank of England against Bank of Scotland*, March 1. 1781.

INSURANCE. See *Periculum*.

See *Jurisdiction*, No. 113.

JURISDICTION. Jurisdiction of the Court of Session, in the first instance, sustained in a question of insurance on a ship. No. 113. p. 210. *Rüchie, &c. against Wilson, &c.* July 5. 1780.

Jurisdiction of the High Admiral Court privative in questions relative to prize-vessels. No. 38. p. 68. B. *Monro against Magistrates of Edinburgh*, Feb. 20. 1781.

Interim appointment by the Court of Session, of a procurator to act in the High Admiral Court. No. 39. p. 70. B. *Collins against Judge Admiral*, Feb. 20. 1781.

Jurisdiction of the Court of Session competent respecting a right to certain feudal casualties conveyed to the claimant by the Crown. No. 64. p. 116. *Sir Lau. Dundas against Officers of State*, Feb. 3. 1779. — *N. B.* Affirmed on appeal to the House of Lords.

A person having intromitted with the effects of a seaman on board a ship, an action for obliging him to account for his intromissions, is not of a maritime nature. No. 12. p. 25.

p. 25. *Bartholomew and others against Chalmers*, Feb. 11. 1778.

Detention of an apprentice to serve at sea, by an impress-officer, not a fact of a maritime nature. No. 35. p. 59. *Chalmers against Napier*, July 28. 1778.

In processes for recovering the penalties imposed by the statutes 1592, c. 127. and 1672, c. 21. the Lyon Court is competent, but not privative. No. 22. p. 36. *Procurator-fiscal of the Lyon Court against Murray of Touchadam*, June 24. 1778.

Court of Session competent in actions of battery *ad civilem effectum*, even in the first instance. No. 33. p. 53. *Mair against Shand*, July 14. 1778.

Court of Session cannot review the judgments of the commissioners appointed by the act 'for the more speedy recruiting his Majesty's forces.' No. 54. p. 78. *Footie and Marshall against Major Stewart*, Aug. 9. 1778.

Justices of the peace may regulate the wages of craftsmen within burgh. No. 27. p. 64. *Major Tailors of Canongate against the Journeymen Tailors*, July 28. 1778.

Court of Session may review regulations made by the justices of the peace concerning the wages of tradesmen, *Ibid.*

The civil courts have no jurisdiction in matters of ecclesiastical concern. No. 126. p. 232. *Roberison against Preston*, &c. Aug. 11. 1780.

Clergymen, in the exercise of their ecclesiastical function, not amenable to the civil courts. No. 87. p. 132. B. *Macqueen and Spouse against Grant*, July 25. 1781.

Jurisdiction of the Court of Session in reviewing the proceedings of the Commissioners under the comprehending act, 19th, Geo. III. No. 81. p. 156. *Patillo against Sir W. Maxwell*, &c. June 25. 1779.

Jurisdiction of the High Admiral Court only competent, and exclusive of that of the English Admiralty in questions of prize in Scotland, particularly with respect to act 16th Geo. III. No. 48. p. 82. *Monro against Jackson*, Dec. 18. 1778.—N. B. Affirmed on appeal to the House of Lords.

Court of Session cannot review a decret of exception pronounced under the authority of the statute 5th Geo. I. p. 22. No. 63. p. 103. B. *Hume against Woods*, July 3. 1781.

K

KIRKYARD. Ministers not entitled to pasture cattle in one, being only allowed to cut the grafs. No. 47. p. 81. *Hay against William-son*, Dec. 2. 1778.

L

LAWBURROWS. A party obtaining letters of Lawburrows is not obliged to shew cause for his fear. No. 27. p. 44. *Sellers against Anderson*, July 3. 1778.

LITIGIOUS. Leases of an extraordinary endurance, granted during the pendency of an application for sequestrating the lands, set aside. No. 28. p. 46. *Creditors of the York-buildings Company against Fordyce and others*,

July 7. 1778.—N. B. Affirmed on appeal to the House of Lords.—No. 29. p. 49. *Creditors of the York-buildings Company against Dr Stewart Threipland*, July 7. 1778.—

N. B. Reversed on appeal to the House of Lords.

LYON. A person having been in possession of a coat-armorial prior to the act of parliament 1592, and having been in use to bear supporters, crest, and device prior to 1660, is presumed to have had an antecedent right to these, although the Lord Lyon is entitled to charge him to matriculate, in terms of the statute 1672, and to pay the fees therein set down, No. 22. p. 36. *Procurator-fiscal of the Lyon Court against Murray of Touchadam*, June 24. 1778.—The Lord Lyon cannot exact higher fees than those expressed in the statute 1672. *Ibid.*

M

MANDATE. Action of relief denied to a mandatory who had furnished goods on an open account, without taking a bill as directed by the mandant. No. 51. p. 91. *Paisley against Rattray*, Jan. 13. 1779.

MANSE. Superior not liable to be assessed for the expence of building a manse. No. 26. p. 42. *Sir Laurence Dundas against Nicolson and others*, July 2. 1778.

MEMBER OF PARLIAMENT. Freeholders not entitled to take cognisance of the conformity of a charrer to the signature. No. 70. p. 132. *Burn against Adam*, Feb. 17. 1779.

Jus tertii. An objection stated to a claimant, who was grantee of the superiority of certain lands held by a vassal together with others under one tenure, that his grant, tending to an undue multiplication of superiors, on the vassal, was *ipso jure* void and null, and incapable of producing that possession which was requisite in freehold claims, repelled, although urged by the vassal himself who was a freeholder. No. 86. p. 142. B. *Campbell against Sloan-Laurie*, Feb. 17. 1781.

The necessary titles of a claimant must be produced before the freeholders. No. 31. p. 56. B. *Moodie against Blaikie*, Feb. 10. 1781.

A party having his title-deeds in his possession when enrolled, but neglecting to lay part of them before the freeholders, allowed to produce them in the court of review, the objection not having been stirred in the court of freeholders. No. 44. p. 80. B. *Hamilton against Catcart*, March 6. 1781.

The enrolment of a claimant by the freeholders in one character, sustained in the court of review in another. No. 46. p. 82. B. *Dalrymple and Bremner against Farquhar Gray*, March 7. 1781.

The statutes requiring the completion of the freeholder's investitures, a year before enrolment, do not extend to the case of husbands claiming in right of their wives investments. *Ibid.*

A person having granted a disposition containing procuratory and precept of the lands on which he had been enrolled, in favour of certain persons, for behoof of his creditors, his right ceases to entitle to the privileges of

an elector. No. 50. p. 83. B. *Mair and Dalrymple, against Macadam, March 7. 1781.*

An objection to a freeholder, that he had granted a disposition with procuratory and precept, of the lands on which he had been enrolled, repelled, the disponee having granted an obligation not to execute the procuratory, nor to divest the granter of the superiority during his life, although this obligation had been granted only six months before the election. No. 49. p. 87. B. *Russel against Ferguson, March 7. 1781.*

Objection to a feizin produced by a claimant, that it did not mention that the disposition and assignation to the precept in the Crown charter had been received by the bailie or notary, nor that it had been read or published by the notary to the witnesses, nor that the feizin was given to the claimant in virtue of the assignation, repelled. No. 15. p. 28. B. *Sir John Scott and Ker against Sir John Dalrymple, Jan. 17. 1781.*

Objection that the writer's designation in the disposition founded on by a claimant was 'writer to the signet,' instead of 'clerk to A. B. writer to the signet,' repelled. No. 15. p. 28. B. *Sir John Scott and Ker against Sir John Dalrymple, Jan. 17. 1781.*

One retour cannot be set up against another. No. 19. p. 37. B. *General Fletcher against Ferrier, Jan. 23. 1781.*

Court of freeholders cannot reject a claimant because his author's right is fettered by a strict entail, although these fetters appear from the titles produced for the claimant. No. 20. p. 39. B. *Houston against Ferrier, Jan. 23. 1781.*

No possession can be attained, in terms of the laws of election, of a superiority of a part of a tenement holding blanch. No. 21. p. 42. B. *Ferrier against Erskine, Jan. 23. 1781.* — N. B. Reversed on appeal to the House of Lords.

No alteration of circumstances, when the renewal of the freeholder's investitures does not proceed on his resignation. No. 22. p. 43. B. *Campbell against Fleming, Jan. 23. 1781.*

A freeholder having wilfully absented himself after the trust-oath was desired to be put, is to be held as refusing to take the oath. No. 8. p. 16. B. *Ferguson against Campbell, Dec. 9. 1780.*

The act 1594, c. 218. applies to freehold-claims. No. 30. p. 55. B. *Haldane against Traill, Feb. 10. 1781.*

Retour sustained as evidence of the old extent,—where the *cumulo valent* amounted to L. 16, 6s. and the descriptive values only to L. 15:3:4. No. 1. p. 1. B. *Burns against Hamilton, Dec. 5. 1780.*

—Where, among several qualifications, the *valent* exceeded the descriptive clause by L. 1:10:8. No. 19. p. 37. B. *Fletcher against Ferrier, Jan. 23. 1780.*

—Where there was an excess in the descriptive clause, it appearing from an enumeration of the values of each particular tenement in the *valent* clause corresponding precisely with the descriptions, that the discrepancy had originated merely from an error

in summing up the extents of the different tenements. No. 48. p. 26. B. *Ferrier against Graham, March 7. 1781.*

Retour not sustained where the *cumulo valent* amounted to L. 7:6:8. and the descriptive values only to L. 5:6:8. No. 42. p. 80. B. *Scott against Hamilton, March 6. 1781.*

Divisions of valuation not made at the meeting held on the day fixed by the act of parliament, nor at an adjourned meeting, nor at one called by the convener, but at a meeting appointed by an Ordinary officiating on the bills, sustained. No. 3. p. 3. B. *Brown against Hamilton, Dec. 6. 1780.*

By act 16th Geo. II. it is sufficient for entitling a claimant to be added to the roll, that the registration of his feizin be a year prior to the day of his enrolment, although a year has not elapsed between the registration and the *teste* of the writ. No. 3. p. 3. B. *Brown against Hamilton, Dec. 6. 1780.*

A party enrolled on an estate valued at more than L. 400, having alienated a part of it, is not under the necessity of making a new claim, but is entitled to remain on the roll, if he has retained what is sufficient for a freehold qualification. No. 14. p. 25. B. *Sir John Scott and Ker against Sir Gilbert Elliot, Jan. 17. 1781.*

Courtesy not being due to a husband as to lands which his wife had acquired by singular titles, he is not entitled to vote under that right. No. 26. p. 48. B. *Sir John Paterson against Ord, Feb. 1. 1781.*

See Procurator.

MINOR. A female just twelve years of age, to whom her mother, and several other persons had, by her father, been named curators—at liberty, in opposition to the latter, to accompany her mother to a foreign country with the purpose of residing there. No. 122. p. 226. *Graham, &c. against Graham, Aug. 8. 1780.*

Deeds *ipso jure* null, need not be reduced within the *quadriennium utile*. No. 64. p. 104. B. *Thomson against Pagan, July 3. 1781.*

MUTUAL CONTRACT. Although a woman, who has in her contract of marriage assigned a bond to which she had right, cannot insist for retention till the provisions due to her are implemented; yet where the husband is taken bound, so soon as the money is paid, to secure the same on land, in favour of himself and wife, in conjunct fee and liferent, the creditors of the husband, who is insolvent, cannot attach the sums, being still *in medio*, without finding caution to her to the extent of the sums recovered. No. 18. p. 35. B. *Partners of the woolen manufactory at Haddington against Gray, Jan. 20. 1781.*

P

PACTUM ILLICITUM. No action for payment of the price of smuggled goods at the instance of the importer. No. 73. p. 138. *MacLure and Macree against Paterson, February 16. 1779.*

Although action is not sustained on a smuggling contract, in a question between the

the importer and purchaser; yet this defence will not be admitted when the goods said to have been smuggled have passed from hand to hand on shore. No. 2. p. 2. B. *Maclean against Sword*, Dec. 5. 1780.

PASSIVE TITLE. Vicious intromission. A son, in virtue of a disposition from his father, having intromitted with his funds, and notified in the newspapers an intention to pay the debts, and having paid accordingly as many as were then claimed, it was found that the rest of the creditors were entitled to receive as much as if, along with those whose debts were already paid, they had been confirmed executors-creditors. No. 121. p. 222. *Smiths against Marshall*, July 21. 1780.

Præceptio hæreditatis. A disposition, titulo lucrativo, having been executed ante contractum debitum, though the intestment was posterior, this passive title not incurred. *Ibid.*

PATRONAGE. Right of presentation may be exercised by a commissioner. No. 6. p. 11. *Tait against Skene-Keith*, Jan. 22. 1778.—N. B. Affirmed on appeal to the House of Lords.

In churches annexed to a benefice, a grant to the benefice conveys the right of patronage. No. 25. p. 40. *Earl of Haddington against the Officers of State*, June 30. 1778.

PENALTY. One having become bound to transport the whole produce of his West India estate in ships belonging to his creditors till their debts were paid, or to pay freight and commission as if he had done so; the Lords considered the last alternative, not as a penalty, which is restricted to the actual damage, but as containing the sum fixed by the parties as a *furrogatum* in place of the first, and therefore decreed for the freight and commission, without any deduction.—No. 10. p. 19. B. *Marshall against Cunningham and Company*, December 13. 1780.—N. B. Affirmed on appeal to the House of Lords.

PERICULUM. In the contract of insurance, a temporary capture, attended with little damage or delay, does not entitle the insured to abandon. No. 103. p. 195. *Edmonstone against Jackson*, Feb. 1. 1780.

Concealment by the insured of the time of a vessel's being loaded, and ready to sail, voids the policy. No. 57. p. 102. *Stewart against Morison*, Jan. 19. 1779.

Concealment of the destination of a ship voids the policy of insurance, though the vessel perished prior to actual deviation from the course specified to the underwriters. No. 86. p. 166. *Buchanans against Hunter-Blair and others*, July 15. 1779.

Concealment of risk vacates the policy. No. 61. p. 99. B. *Thomson against Buchanan and others*, June 20. 1781.—N. B. This decision reversed on appeal.

PERSONAL AND REAL. An adjudication with intestment a preferable title to that of a prior disponee uninfest. No. 35. p. 60. B. *Mitchels against Ferguson*, Feb. 13. 1781.

A tack granted by a person having only personal right, not valid against a singular successor of that person when infest. No.

109. p. 205. *Gordon against Milne*, Feb. 29. 1780.

A trustee infest in an heritable subject for behoof of creditors, having conveyed the trust-estate to the heir of the truster, the creditors of the truster entitled to no preference in a competition with those of the heir. No. 71. p. 119. B. *Clark against Robertson*, July 4. 1781.

A disposition granted under condition of certain provisions being paid, which, however, were not in the warrant of intestment, declared real burdens on the lands, though appearing in the intestment itself, not sufficient to constitute them real burdens. No. 118. p. 218. *Allan against Creditors of Cameron*, July 19. 1780.—N. B. Affirmed on appeal to the House of Lords.

POOR. Three years residence intitles to an aliment. No. 55. p. 95. B. *Waddell against Kirk-Session of Hutton*, June 14. 1781.

The place of the parents residence for the last three years, and not that of childrens birth, liable for their maintenance. No. 88. p. 172. *Heritors and Kirk-session of Coldingham against Heritors and Kirk-session of Dunfermline*, July 28. 1779.

PRESCRIPTION.—Septennial. Act 1695 applies not to cautionary obligations in judicial proceedings. No. 35. p. 63. B. *Mackinlay against Ewing*, Feb. 14. 1781.

After the years of prescription, not competent to object, that seizin had not been taken on the grounds of the lands, and that its having been taken elsewhere was not authorised by a proper clause of union or other dispensation. No. 84. p. 163. *Scott against Bruce-Stewart*, July 1. 1779.

A co-obligant in a personal bond bearing interest, having for many years paid the annualrents as they fell due, and afterwards the principal sum, his claim of relief as to these annualrents subsists as long as that for the principal sum. No. 94. p. 178. *Anstruthers against the Countess of Rothes*, Dec. 9. 1779.

Prescription cannot be pleaded by one who has no interest. No. 66. p. 107. B. *York-buildings Company against Wauchope*, July 3. 1781.—N. B. Affirmed on appeal to the House of Lords.

A person appointed trustee in a deed for uses after the English form, transferred the trust-funds to the person first favoured in the trust, and obtained from him a discharge of her intromissions. More than forty years afterwards, one of the persons favoured in the trust having brought an action for ascertaining his right, the Lords found it cut off by the negative prescription. No. 7. p. 14. *Lady Craufurd against Mrs Lochart of Lee*, Jan. 28. 1778.—N. B. Affirmed on appeal to the House of Lords.

Act 1579, cap. 83. does not apply to accounts between the matter of a ship and its owners. No. 54. p. 94. B. *Butchart and others against Mudie and others*, June 13. 1781.

PRESUMED WILL. A person conveyed to A, for behoof of B, a sum of money, which, in case of B's death was to devolve to the children of three families equally. At the testator's

testator's death one of the children was unborn, and at B's death several of them were predeceased, but who had survived the testator; and one of them had left issue. The Lords found the sum should be divided among the children equally *in capita*; and that each of the children who existed at the death of B, though born after that of the testator, had equal right to a share, and that the issue of the children who predeceased B had right to their parents share; but that the nearest in kin of the children who died without issue before B, had no right to any part. No. 27. p. 49. B. *Mackenzie against Holt*, Feb. 2. 1781.

PRESUMPTION. A creditor by account to a company, at their dissolution took a bill from a new company, formed of the same members, one excepted; but, this becoming bankrupt, sued that member; who was found not liable. No. 71. p. 135. *Buchanan and Company against Somerville*, Feb. 19. 1779.

Presumption that physicians fees are paid, may be elided by contrary presumptions.—No. 60. p. 98. B. *Hamilton against Gibsons*, June 15. 1781.

An annuitant living at a distance, the *onus probandi* of her being in life does not lie on a person claiming in her right. No. 60. p. 108. *Lade against Scott*, Jan. 28. 1779.

PRISONER. *Cessio bonorum*. This benefit not prevented by a creditor's consenting to previous liberation. No. 63. p. 115. *Mackenzie against his Creditors*, Feb. 3. 1779.

A party imprisoned for not payment of a sum awarded in name of damages, for having maltreated another, not entitled to the privilege of *Cessio bonorum*. No. 81. p. 137. B. *Stewart against Macglashan*, Aug. 9. 1781.

Magistrates liable if they do not imprison the debtor as soon as delivered to them.—No. 53. p. 93. B. *Bell against the Magistrates of Lochmaben*, June 13. 1781. No. 6. p. 12. B. *Gray against the Magistrates of Dumfries*, Dec. 7. 1780.

Defence by Magistrates who had delayed to incarcerate a debtor, that the creditor could have recovered nothing by the debtor's imprisonment, repelled. No. 6. p. 12. B. *Gray against the Magistrates of Dumfries*, Dec. 7. 1780.

Magistrates are not in safety to dismiss a debtor from prison on account of his state of health, unless in the precise terms of the act of sederunt June 14. 1671. No. 47. p. 85. B. *Fullarton and Kennedy against the Magistrates of Ayr*, March 7. 1781.

PRIVILEGED DEBT. Wages due to farm-servants, such. No. 58. p. 106. *Melville against Barclay*, Jan. 23. 1779.

Wages due to servants, artisans, not such. No. 24. p. 45. B. *White against Christie*, Jan. 31. 1781.

PRIZE. A ship loaded with the produce of an island at war with Britain, considered as a ship of the enemy. No. 85. p. 141. B.—*Hendricks against Cunningham and others*, Jan. 3. 1782.—N. B. This decision reversed on appeal to the House of Lords.

PROCESS. In a process in absence, the pursuer

cannot make any addition to the original conclusions of his libel, but must bring a new action. No. 11. p. 21. B. *Innes against Clark*, Dec. 22. 1780.

Proceedings on a summons called before the last diet of compareance, being intrinsically void and null, do not prevent the pursuer from calling the summons anew after the *inducie* are run. No. 23. p. 38. *Wilsons against Lochhead*, June 25. 1778.

A party about to pursue an action of reduction before the Court of Session, took a precognition before an inferior magistrate relative to it, in which he examined the defender and several other persons. Having afterwards, in his process of reduction, insisted for an examination of the defender, who demanded inspection not only of his own declaration before the inferior magistrate, but also of those of the other witnesses, and likewise of certain writings in the pursuer's possession, the Lords, after expressing their dissatisfaction with the pursuer's conduct, allowed the defender to see his former declaration, but not the other declarations and writings called for. No. 40. p. 69. *Bogle against Tule*, Aug. 4. 1778.

Edictal citations in a ranking and sale not being recorded before the last day to which the citations are given, the pursuer may, after calling his summons, let it fall out of the roll, and call it anew. No. 119. p. 220. *Cunningham, Dougal, and Company, against Marshall*, July 20. 1780.

PROCURATOR. A mandate necessary to authorise a claim for a person residing abroad, to be enrolled at a meeting of freeholders. No. 120. p. 221. *Dundas against Ferguson*, July 20. 1780.

PROPERTY. State of slavery inconsistent with the laws of Scotland: Not supported as an obligation to perpetual service; nor can the person who has brought a slave into Scotland transport him to the plantations against his will. No. 3. p. 5. *Knight against Wedderburn*, Jan. 15. 1778.

A proprietor may not allow his trees to grow in such a manner, that their branches hang over the property of the conterminous heritor. No. 65. p. 105. B. *Halkerston against Wedderburn*, July 3. 1781.

PROVING THE TENOR. Special *casus amissionis* necessary in proving the tenor of bills of exchange. No. 106. p. 200. *Campbell against Creditors of York-buildings Company*, Feb. 22. 1780.

No *casus amissionis* necessary in proving the tenor of a decret of irritancy of a feu-right *ob non solum canonem*. No. 62. p. 100. B. *Luke of Argyle against Sir Allan Maclean*, June 29. 1781.

PROVISIONS TO HEIRS AND CHILDREN. An assignment by an heir of a marriage of her interest, ineffectual, she having predeceased her father. No. 96. p. 185. *Maconochie against Greenlees*, Jan. 12. 1780.

See *Fiar*, absolute, limited.

PUBLIC OFFICER. The office of precentor and session-clerk held during pleasure. No. 52. p. 93. *Anderson against Kirk-session of Kirk-wall and J. Redford*, Jan. 13. 1779.

PUBLIC

PUBLIC POLICE. Expresses dispatched from the post-office, though on the affairs of private persons, not subject to payment of toll. No. 80. p. 154. *Jackson against Ure*, June 24. 1779.

See Property.

QUALIFIED OATH. See Approbate and Reprobate.

R

RANKING AND SALE. A Lord Ordinary, before whom a summons of ranking and sale is called, cannot enquire into the extent of the bankruptcy, the diligence used by the creditors, or whether the creditors are in possession; but only into the title of the pursuer, relevancy of the libel, and whether those having interest have been properly made parties. No. 13. p. 23. B. *Cunningham and Company against Marshall*, Dec. 22. 1780.

RECOMPENCE. A person not entitled to meliorations on an estate subject to a strict entail. No. 99. p. 190. *Dillon against Campbell*, Jan. 14. 1780.

Not due to a tutor for an extraordinary risk submitted to for the advantage of the pupil. No. 127. p. 233. *Lord Macdonald against Mackenzie-Muir*, Nov. 13. 1780.

REGALIA. Right of cruiue-fishing may not interfere with the navigation of a public river. No. 52. p. 90. B. *Sir James Grant and others against the Duke of Gordon*, March 9. 1781.—N. B. Affirmed on appeal to the House of Lords.

REMOVING. Warning: The ceremony of chalking the door a sufficient warning as to dwelling-houses, even when performed without the authority of a magistrate. No. 73. p. 127. B. *Jolly against Stevenson*, July 10. 1781.

In considering the value of the stocking on a farm as sufficient for the landlord's security, cattle taken in to graze are not computed, these not being subject to the hypothec. No. 128. p. 234. *Ross McKye against Nabony*, Dec. 4. 1780.

An arrear of a year's rent due to a landlord's executor, does not entitle his heir to pursue an action of removing. No. 101. p. 193. *Lord Elibank against Hay*, January 19. 1780.

RENTAL. The possessors of lands on the estate of Seton not entitled as rentallers to retain possession. No. 70. p. 114. B. *Mackenzie against Cullen and others*, July 4. 1781.

REPARATION. Impres-officer found liable in damages on account of an illegal impressment. No. 7. p. 13. B. *Syme against Napier*, Dec. 8. 1780.

An impres-officer having illegally impressed an apprentice who had no protection, assailed from an action of damages at the suit of the master, the pursuer not having immediately offered to shew that the party impressed was an apprentice. No. 35. p. 59. *Chalmers against Napier*, July 28. 1778.

RIGHT IN SECURITY. A real security, as by ad-

judication, diminished by a prior confirmation as executor-creditor. No. 107. p. 201. *Tait, &c. against Sir James Cockburn*, Feb. 24. 1780.

A disposition of lands granted in security of what sums might be advanced in consequence of an extensive credit given, followed with infestment, duly recorded, effectual. No. 41. p. 72. B. *Bank of England against Bank of Scotland*, March 1. 1781.

A bill having been granted to, and indorsed by a person who, afterwards becoming bankrupt, disposed his whole effects to trustees for his creditors; and, posterior to the trust-right, a partial payment of the bill having been made, whether the indorsees ought to be ranked for the whole sum, or only for the balance. No. 66. p. 124. *Dunlope against Spiers*, Feb. 5. 1779.

RUNRIG. Small fields disjoined by others intervening, not the subject of the act 1695. No. 115. p. 214. *Murison against Drysdale*, July 14. 1780.

S

SALE. Error in *substantialibus* vitiates every sale, whether voluntary or judicial. No. 69. p. 113. B. *Hepburn and Sommerville against Campbell*, July 4. 1781.

Sale completed, although by an article in the bargain, the price was to be fixed by arbiters, who had given no decision when one of the parties died. No. 4. p. 9. *Earl of Selkirk against Nasmyth*, Jan. 17. 1778.

SALMON-FISHING. Crown may grant a right of cruiue-fishing, even in a river where it had before granted rights of salmon-fishing to other heritors. No. 33. p. 54. *Sir James Grant against the Duke of Gordon*, July 22. 1778.

SANCTUARY. The concurrence of the bailie of the Abbey of Holyroodhouse necessary to the apprehending of a prisoner within its precincts; and in order to obtain the privilege of the sanctuary, booking requisite.—No. 55. p. 98. *Grant against Donaldson*, Jan. 15. 1779.

SEQUESTRATION.—Act 1772.—Claims not lodged with the clerk of the sequestration before nine months after the date of the sequestration, do not entitle the creditor to draw any part of the first distribution. No. 5. p. 10. *Montgomery and others against Parker*, Jan. 18. 1778.

The stocking of a tenant having been sequestrated by his landlord, and afterwards a total sequestration of his whole moveables, awarded under the authority of 12th Geo. III. the factor not entitled *de plano* to pay the landlord. No. 67. p. 127. *Dickson against Watson*, Feb. 6. 1779.

A factor on the personal estate of a tenant sequestrated under the act 1772, may sell the stocking on the farm, if the landlord's hypothec is not thereby infringed. No. 111. p. 208. *Creditors of Wright against Ker*, June 21. 1780.

Sequestration not competent where there is no competition. No. 85. p. 129. B. *Blackwoods petitioners*, July 24. 1781.

T t

SERVICE.

SERVICE AND CONFIRMATION. Executors entitled to have part of the effects confirmed, although the whole have been inventoried and appretiated. No. 13. p. 26. *Nasmyth against the Commissaries of Edinburgh*, February 14. 1778.

SERVITUDE. The burghesses and inhabitants of a burgh may by usage acquire the servitude of bleaching cloths, &c. No. 68. p. 128. *Sinclair against the Magistrates of Dysart*, Feb. 10. 1779.—N. B. Affirmed on appeal to the House of Lords.

An *opus manufactum* on an inferior tenement by the proprietor, to prevent the water of a superior tenement from flowing down upon it, illegal. No. 54. p. 96. *Hope against Wauchope*, Jan. 14. 1779.—N. B. On appeal to the House of Lords, remitted to the Court of Session.

SOCIETY. Debts due upon a joint adventure preferable to those of the adventurers individually. No. 62. p. 113. *Crooks against Tawse*, Jan. 29. 1779.

Partners may call for a contribution beyond the capital subscribed, for the purpose of paying the debts of the Company. No. 34. p. 57. *Douglas, Heron, and Company against Hair*, July 24. 1778.

Society not dissolved by giving over trade. *Ibid.*

SOLDIER. The twenty-four hours given by sect. 73. of the mutiny-act to persons enlisted to declare their dissent to enlisting, runs, not from the period of their enlistment, but from that of their being called before a magistrate for the purpose of being attested. No. 39. p. 67. *Low and others against Captain Drummond*, July 30. 1778.

The shilling or other money given by the serjeant as the symbol of enlistment, being part of the charges laid out in enlisting, is included in the 20s. of smart-money paid when the party enlisted declares his dissent to enlisting. No. 39. p. 67. *Low against Drummond*, July 30. 1778.

SUMMARY APPLICATION. Summary application by a substitute in an entail, for recording it in the register of tailzies, incompetent where the deed of entail is not produced. No. 90. p. 136. B. *Spittal, petitioner*, August 3. 1781.

SUPERIOR AND VASSAL. A superior not permitted to parcel out the *dominium directum* among a plurality of persons to whom he had granted liferent rights of it. No. 25. p. 46. B. *Sir James Colquhoun against Duke of Montrose*, Jan. 31. 1781.—N. B. Affirmed on appeal to the House of Lords.

A grant from the crown of the casualties attendant on the entry of its vassals, illegal and unconstitutional. No. 64. p. 116. *Sir Laurence Dundas against Officers of State and others*, Feb. 3. 1779.—Affirmed on appeal to the House of Lords.

See Manse.

T

TACIT RELOCATION. Warning in due time requisite to the dismissal of servants. No. 85. p. 165. *Baird against Lady Don*, July 14. 1779.

TACK. Right to shell-marl found within the farm belongs solely to the landlord, who may work it during the lease, on paying the tenant's damages. No. 9. p. 20. *Bethune against Jarvice*, Feb. 10. 1778.

A tackman became bound by way of rent, to furnish certain quantities of coal at a stipulated price, upon the landlord's making payment to him once a fortnight, for the coals delivered during that period. The landlord having run in arrear, and his estate having been adjudged by his other creditors, who pursued the tackman for the quantities of coal bargained for, the Lords found the defender entitled to retention ay and until the arrears due to him were discharged. No. 104. p. 198. *Walpole and Allison against Montgomery-Beaumont*, Feb. 16. 1780.

TAILZIE. An heir of entail cannot grant leases of immoderate endurance. No. 74. p. 141. *Leslie against Orme*, March 2. 1779.—N. B. Affirmed on appeal to the House of Lords.

An entail, having clauses prohibitory and resolute, but not expressly irritant, invalid against creditors. No. 61. p. 110. *Kempt against Watt*, Jan. 28. 1779.

See Clause.

TEIND. No new augmentation of stipend to be given where one had been obtained since the Union. No. 84. p. 141. B. *Milligan against Heritors of Kirkden*, Aug. 4. 1779.—N. B. This case was appealed to the House of Lords. *See Abstract of Appealed Cases*, p. 141. B.

TERCE. Not payable out of the rents or profits of coal; not excluded by a separate provision, when not so stipulated; though postponed to the annual rent of debts really secured, yet not to the payment of any part of the principal; and in respect of the tercer, and of other creditors, the annual renters are bound to draw proportionally from the rent of the coal, and from that of the lands and teinds. No. 83. p. 159. *Belschier against Moffat and others*, June 30. 1779.

THIRLAGE. The proprietor of a mill of barony cannot erect it without the barony against the will of the sucken. No. 29. p. 52. B. *Ballardie against Bisset*, Feb. 8. 1781.

Use and wont may make a clause of grindable grains import the same thing with that of *grana crescentia*. No. 57. p. 97. B. *Greig and others against Reid and others*, June 14. 1781.

See Warrandice, No. 100.

TITLE TO PURSUE. A general service no sufficient title as to lands. No. 65. p. 122. *Graham against Graham*, Feb. 4. 1779.

See Tutor.

TUTOR. Curators removed as suspect, at the instance of their cautioners. No. 14. p. 27. *Welsh against Welsh and others*, February 14. 1778.

W

WARRANTICE. Warrantice incurred, although the purchaser might have prevented the eviction. No. 122. p. 225. *Dewar against Aitken*, July 1780.

A proprietor

A proprietor not bound by a general clause of warrandice to relieve his tenant of a thirlage. No. 100. p. 192. *Symington against Cranston*, Jan. 14. 1780.

WRIT. Objection to a lease, that the testing clause did not bear the number of pages, repelled, the deed being written on one sheet of paper, and the testing clause commencing on the end of the second page. No. 15. p. 28. *Macdonald against Macdonald and his tutors*, Feb. 14. 1778.

An agreement to grant a lease, being equivalent to a lease, must be stamped in the same manner. *Ibid.*

Devolution to an oversman in a submission must be completed, in terms of the statute

1681. No. 102. p. 195. *Herriot against Wight*, Jan. 20. 1780.

Writ-privileged. A missive letter of a cautionary nature, in a mercantile transaction, though not holograph, and without the statutory solemnities, the subscription being acknowledged, valid. No. 56. p. 100. *Clark against Ross*, Jan. 19. 1779.

An indenture between master and apprentice defective in the requisite solemnities, homologated by the parties, and rendered binding. No. 74. p. 128. *B. Rymer against Mackintyre*, July 19. 1781.

Discharge of an annuity must be attested, in terms of the statute 1681. No. 67. p. 111. *B. Grierison against King*, July 4. 1781.



